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In The
Supreme Court of The United States
October Term 1994

KATHRYN THOMPSON REMMEY and ERNEST M. REMMEY, Executors of the Estate of LOUISE REMMEY, Deceased,
Petitioners,

v.

PAINEWEBBER INCORPORATED and ARNOLD MARKS,
Respondents.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED

I. Whether concealment from the parties of an arbitrator's history of securities ethics violations is grounds for vacatur of an arbitration decision under 9 U.S.C. § 10(a).

II. Whether a party to a federal arbitration has the burden of doing his own independent investigation of the arbitrators, and may not rely on the accuracy and completeness of the information on the arbitrators furnished by the arbitrators and the self-regulatory organization (SRO) conducting the arbitration.

III. Whether an SRO, in appointing arbitrators, may ignore regulations mandated by the Securities Exchange Commission (SEC), set forth in the SRO's rules. See Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 232 (1987).

approving arbitration in securities disputes only because of the SEC regulatory power.

IV Whether a party to a federal arbitration who shows that relevant and material information about the arbitrators was not provided is entitled to have the arbitration vacated under 9 U.S.C. § 10(a). The Fourth Circuit holding that petitioner is not so entitled is contrary to Commonwealth Coatings Corp. v. Continental Cas. Co., 393 U.S. 145 (1968) and decisions from the 2d, 6th, 7th, 9th and 11th Circuits. See also Affiliated Ute Citizens v. United States, 406 U.S. 128, 154 (1972).

LIST OF PARTIES

The only parties to this proceeding are named in the caption.

This matter commenced as an action brought in 1990 by Mrs. Louise Remmey through her attorney-in-fact, Mrs. Kaye Grove, seeking recovery against an individual stockbroker, Arnold Marks, and his employer, PaineWebber, Incorporated.

Following Mrs. Remmey's death on March 20, 1993, the executors of her estate, Kathryn Thompson Remmey and Ernest M. Remmey, were substituted as plaintiffs by Motion to the United States District Court for the Middle District of North Carolina.

For ease of reference within this Petition, PaineWebber, Incorporated will be referred to as PW and Arnold Marks will be referred to as Marks. Petitioners will be referred to collectively or as Remmey or Mrs. Remmey.

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OFFICIAL AND UNOFFICIAL OPINIONS INVOLVED IN THIS CASE

Citations herein to the appendix are as A 50.

The arbitration decision was rendered January 17, 1992. (A 56). Petitioners' Motion to Vacate the arbitration decision was denied by the U. S. District Court for the Middle District of North Carolina on December 14, 1992, by Memorandum Opinion and Final Judgment. (A 31, 42). Petitioners' motions under Federal Rules 52(b) and 60 were denied July 15, 1993. (A 54). Pursuant to Appellate Rules 3 and 4, notice of appeal as of right was given on August 13, 1993.

The U. S. Court of Appeals for the Fourth Circuit affirmed the District Court decision on August 19, 1994. 32 F.3d 143 (4th Cir. 1994). (A 1). A Petition for Rehearing with Suggestion for Rehearing en

banc was denied on September 13, 1994. (A 62).

JURISDICTIONAL STATEMENT

The date of entry of the judgment of the Fourth Circuit sought to be reviewed is August 19, 1994. This Petition for Writ of Certiorari is based on 28 U.S.C. § 1254(1).

PERTINENT STATUTES AND REGULATIONS

The texts of pertinent law are in the Appendix hereto: U. S. CONST., amend. V (A 64); 9 U.S.C. § 10(a)(1)-(4) (A 64); NASD Code of Arbitration Procedure §§ 19, 21, 22, 23 (A 65-72); NASD Rules of Fair Practice, Article III, §§ 1, 2 (A 72); and NASD Rules of Fair Practice, Append. F, § 3 (A 73).

STATEMENT OF THE CASE

In December 1985, Louise Remmey, then 80 and suffering from congestive heart failure, entrusted her securities to Marks, a broker employed by PW, pursuant to a

Resource Management Account (RMA). Mrs. Remmey suffered a stroke in February 1986. By September 1989, Marks had shifted Mrs. Remmey's portfolio from suitable investments, consisting of 91.4% bonds and debt instruments, to investments highly unsuitable. Marks admitted recommending every trade in the Remmey account and under Fourth Circuit precedent Marks is deemed in control of the account. See, e.g., Carras v. Burns, 516 F.2d 251, 258 (4th Cir. 1975). Pursuant to Marks' recommendations 65.4% of Mrs. Remmey's assets, or $443,000, was shifted to real estate limited partnerships and 18.52% was moved to proprietary and closed end mutual funds. All these investments carried very high brokerage commissions upon purchase. The partnerships were not generally marketable, so their values at any time are not readily ascertainable. But leaving aside other

losses arising from PW's and Marks' trading of the Remmey account, by the time of the arbitration hearings the ten real estate limited partnerships sold by PW through Marks had lost between $153,936 (PW employee's testimony) and $366,960 (petitioners' expert testimony) from the total purchase prices thereof. In September 1989 Marks changed his employment from PW to Prudential Bache, taking the Remmey account with him. Members of Mrs. Remmey's family then learned of the types of investments which had been made in the account and removed the account from Marks' control shortly thereafter.

Suit was filed against Marks and PW in October 1990 on behalf of Mrs. Remmey, then totally incompetent, by Mrs. Kaye Grove, her attorney-in-fact, seeking damages under the federal securities laws and pendent state claims for fraud and breach of

fiduciary duty. PW referred to a mandatory arbitration clause in fine print in its RMA account document, and the matter was referred by the parties to arbitration under the Federal Arbitration Act, 9 U.S.C. §§ 1-16, and the rules of the National Association of Securities Dealers (NASD).

Sections 19(b) and (d) of the NASD Code of Arbitration Procedure (NASD Code) provide that in arbitration matters involving public customers in sums exceeding $30,000 a majority of the arbitrators shall not be from the securities industry and shall be deemed "public" arbitrators. (A 65-67). Section 22 of NASD Code also provides that each party shall have one peremptory challenge to the arbitrators appointed by the NASD. (A 69). NASD appointed Marshall H. Johnson, a Greensboro stockbroker, as the industry arbitrator, and H. Victor

Schwimmer and Stanley V. Lewis as public arbitrators. Repeated requests by petitioners' counsel in letters of August 7, 21, and 27, 1991 (A 76-82), for copies of the sworn application questionnaires (termed "Arbitrator Profiles" by NASD), by which the persons appointed as arbitrators sought appointments to the NASD pool of arbitrators, elicited no response from the NASD Director of Arbitration. Petitioners' requests were authorized by NASD Code § 21 (A 67-69) which states that "[a] party may make further inquiry of the Director of Arbitration concerning an arbitrator's background," in addition to names and employment histories spanning ten years, and NASD Code § 23 disclosures. (A 67-68).

Testimony before the arbitration panel centered around PW's and Marks' violations of NASD Rules of Fair Practice involving unsuitable investments, churning, and lack

of broker supervision. The arbitration panel dismissed all of Mrs. Remmey's claims and set arbitrators' fees totaling $10,000 equally between Mrs. Remmey and PW.

Counsel for Mrs. Remmey filed a motion to vacate the arbitration decision in the District Court. Petitioners' counsel issued subpoenas to NASD for the sworn arbitrator profile questionnaires and all other information available to NASD about the persons appointed as arbitrators. As a result NASD agreed to furnish by affidavit significant additional information about the arbitrators. A description of some of this information follows.

A. Post-Award Information About The Industry Arbitrator

The NASD produced incontrovertible evidence that arbitrator Johnson had himself been found guilty of six violations of the NASD Rules of Fair Practice, with

similarities to those at issue in this case, and that he had submitted a sworn false arbitrator profile questionnaire on February 13, 1989, which covered up these ethical violations.

The arbitrator profile, signed and submitted by Johnson seeking appointments as an NASD arbitrator, asked whether "any self-regulatory organization" had found him to be "involved in a violation of its rules." Johnson answered this question with a mark in the "no" column and offered no explanation with, or for, this answer, although ample space for comments was provided. The answer was false. The NASD District Business Conduct Committee had, on two separate previous occasions, found Johnson guilty of six distinct violations of Article III, Section 1 of the NASD Rules of Fair Practice, requiring "high standards of commercial honor and just and equitable

principles of trade." (A 72-3). In addition, Johnson had been found guilty of two other rule infractions, making a total of eight infractions which he should have reported in answer to the above question. Fines were assessed against Johnson and his brokerage firm in amounts of $1,000 in June 1980 and $500 in December 1978 for some of the violations.

Mrs. Remmey's claims against Marks and PW were of a nature similar to those involved in the NASD proceedings against Johnson. For example, Johnson was found, on a number of public issue prospectuses, to have placed a label with the address and phone number of his firm over the names of managing underwriters, obviously misleading to customers as to the identity of the underwriters of the securities. Misrepresentation as to suitability and character of the investments sold to Mrs.

Remmey were issues in this case. Similarly, Johnson was found guilty of failing properly to supervise individual brokers working for his firm, paralleling an issue here as to PW's supervision of Marks.

B. Lack of Required Qualification Ascertainment for The "Public" Arbitrators, Revealed Post-Award

With regard to Schwimmer and Lewis the subpoenaed information from NASD disclosed that NASD did not have any sworn arbitrator profile questionnaire for Schwimmer. There was nothing in NASD's files at all to qualify this panelist as a public arbitrator. With regard to Lewis there was on file an arbitrator profile questionnaire dated July 31, 1989, but it in no way qualified under NASD's own rules as a determination whether Lewis met the requirements of public arbitrator specified

by NASD Code §§ 19(c) and (d), as amended. (A 66-67).

On March 26, 1990, the NASD Director of Arbitration had sent a Memorandum entitled Arbitrator Profile Update to all persons on NASD's list of arbitrators. The Memorandum is in the Appendix. (A 82). The Memorandum noted the critical importance of arbitrator classification, referring to Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220 (1987). The Memorandum stated that Shearson/Am. Express expressed the belief that an arbitration forum provides a "fair, just and prompt resolution of securities disputes," but also noted skepticism regarding fairness, from both this Court and the Securities Exchange Commission (SEC), that "individuals with industry ties [were being] classified as public arbitrators." (Emphasis supplied). (A 83). The

Memorandum stated, "This skepticism was detailed by the SEC in a letter to the NASD and other self-regulatory organizations recommending certain categories to be excluded from the pool of public arbitrators." (A 83-4). The Memorandum announced that NASD had amended its Code of Arbitration Procedure on May 10, 1989, in response to the SEC letter, to exclude from serving as public arbitrators any "professional who has devoted twenty (20) percent or more of his or her professional work effort to securities industry clients within the last two years . . . ." (A 84-5). See NASD Code § 19(c)(5). (A 67).

The March 26, 1990 Memorandum directed each recipient to complete an updating "arbitrator questionnaire" for the purpose of enabling the NASD to classify arbitrators as "securities or public arbitrators in accordance with the

provisions of the new rules," and stated that a number of individuals who were then serving as public arbitrators would "be reclassified as securities arbitrators or be removed from the national pool." (A 86). The Memorandum stated that NASD's arbitrator data base for classification of arbitrators required additional information about the arbitrators. (A 86).

Among other subjects, the updating questionnaire asked whether the arbitrator had "been an expert for a broker/dealer in an action or in support of a claim against a broker/dealer over the past two years."

Neither Lewis nor Schwimmer ever returned the March 26, 1990 questionnaire. Lewis had sworn to an earlier profile, and was approved as an arbitrator by NASD on July 31, 1989, but NASD would not provide the earlier sworn profile for petitioners prior to the arbitration. But the subpoena

also brought forth, with Lewis' 1989 sworn profile, a related document entitled "Curriculum Vitae," and labeled "Input 8/29/91," which date was just twelve days before the arbitration was to begin. This document, in the Appendix at p. 87, detailed consistent involvement by Lewis on securities industry boards, panels, and committees, and as an arbitrator and expert witness in securities matters. This information, which raised serious questions about Lewis' qualifications as a public arbitrator pursuant to the guidelines of NASD Code § 19(c), was never provided petitioners before the arbitration. Essentially, the only information about Lewis provided to petitioners was that outlined in the Fourth Circuit opinion, i.e., that Lewis had retired in 1989 as Deputy Securities Commissioner in South Carolina, had before that been a securities

examiner for the State, and had been a stockbroker for five years prior to 1970. (A 12).

The subpoenaed documents presented to the District Court and to the Court of Appeals thus demonstrated that none of the arbitrators appointed in this case were qualified to serve and their appointment by NASD deprived petitioner of due process of law under the Fifth Amendment to the Constitution of the United States, unless the arbitration is vacated, as it should be, pursuant to 9 U.S.C. § 10(a)(1) because corrupt, fraudulent, or brought about through undue means, or partiality or arbitrator misconduct pursuant to 9 U.S.C. §§ 10(a)(2) and (3). (A 64-65).

BASIS FOR FEDERAL JURISDICTION

This action sought recovery under the anti-fraud provisions of the securities laws of the United States, 15 U.S.C. §

78j(b). Arbitration was pursuant to 9 U.S.C. §§ 1-16.

The United States Fourth Circuit had appellate jurisdiction pursuant to 28 U.S.C. § 1291. The actions below deprived petitioners of due process under the United States Constitution, Amendment V.

ARGUMENT

A. Introduction

This petition for writ of certiorari should be granted, pursuant to Supreme Court Rule 10, because the Fourth Circuit opinion conflicts with mandates of this Court requiring supervision "sufficient to ensure that arbitrators comply with the requirements of the statute." Shearson/Am. Express, 482 U.S. at 232. The Fourth Circuit decision allows the NASD to flaunt SEC regulations, despite that the availability of oversight by SEC was the basis on which this Court approved

arbitration in securities cases. Id. It is in conflict with the substantive law in this Court's opinions of Commonwealth Coatings Corp. v. Continental Cas. Co., 393 U.S. 145 (1968) and Affiliated Ute Citizens v. United States, 406 U.S. 128, 154 (1972).

It further conflicts with federal circuit and district court decisions such as Middlesex Mut. Ins. Co. v. Levine, 675 F.2d 1197 (11th Cir. 1982); Apperson v. Fleet Carrier Corp., 879 F.2d 1344, 1358-59 (6th Cir. 1989), cert. denied, 493 U.S. 809 (1989); and Rogers, Att'y Gen. v. Schering Corp., 165 F. Supp. 295 (D.N.J. 1958), mot. denied 262 F.2d 180 (3d Cir. 1959), aff'd 271 F.2d 266 (3d Cir. 1959), cert. denied 359 U.S. 991 (1959).

This petition should also be granted for this Court to address the question whether an arbitrator's history of ethics violation convictions must be disclosed to

arbitration participants so that failure to disclose is grounds for vacatur.

Furthermore, this Court should address a split in circuit decisions, wherein the Fourth Circuit appears to hold an arbitration participant to a standard of proof of harm from bias, as a ground for vacatur, while other circuits have adopted the standard that a "reasonable impression of bias" is sufficient. The "reasonable impression" standard is discussed in Apperson, 879 F.2d at 1358, which notes similarity among other circuits: the Second (Morelite Const. Corp. v. New York City District Council Carpenters Benefit Fund, 748 F.2d 79 (1984)), the Seventh (Merit Ins. Co. v. Leatherby Ins. Co., 714 F.2d 673, 681-82, cert. denied, 464 U.S. 1009 (1983)), and the Ninth (Toyota of Berkeley v. Automobile Salesmen's Union, Local 1095, 834 F.2d 751, 755-56, cert. denied 486 U.S.

1043 (1988) and Sheet Metal Workers Int'l Ass'n Local 420 v. Kinney Air Conditioning, 756 F.2d 742, 745-46 (1985)).

B. The "Industry" Arbitrator

The Fourth Circuit has condoned concealment by an arbitrator and NASD of the arbitrator's past ethical violations. This holding threatens the underpinnings of the arbitration system and must be corrected. That the information about Johnson was material as to his pre-existing bias or partiality cannot be gainsaid. See 9 U.S.C. § 10(a)(2). (A 64-65). Any trial lawyer would use a peremptory challenge on a prospective juror who had been found guilty of an offense the same or similar to the matter before the court. A taint sufficient to subject a juror to challenge was a test of materiality articulated for arbitration proceedings in Commonwealth,

393 U.S. at 148. Obviously the information about Johnson's rule violations was material. Otherwise, why did the NASD questionnaire ask about them? The Court of Appeals recognized the materiality of the information. It said in dicta:

> Regardless of whether NASD rules strictly require disclosure of an arbitrator's past NASD disciplinary infractions, it seems apparent that public confidence in the NASD arbitration process would be enhanced if such information were not only available to the parties, but was in fact actually conveyed to them. (A 15, fn. 4).

The Court of Appeals sought to justify limiting this ruling to dicta by holding that petitioner "has not shown that these [ethical] infractions affected Johnson's impartiality, thereby yielding an impermissible award." (A 16). This holding ignores the long established precedent in this Court that if material facts are withheld or concealed, reliance

thereon and causation of harm by such concealment are presumed. "This obligation to disclose and this withholding of material facts established the requisite element of causation in fact." Affiliated Ute Citizens, 406 U.S. at 154. Compare also this Court's holding in Commonwealth, where the petitioner apparently even conceded there was no actual bias. 393 U.S. at 147. Nevertheless, the award in Commonwealth was "set aside on the basis of 'evident partiality' or the use of 'undue means'" because of nondisclosure to the petitioner of "dealings that might create an impression of possible bias." 393 at 148-149. The circumstances regarding Johnson also clearly meet the "reasonable impression of partiality" standard discussed in Apperson, 879 at 1358 (adopted in the 2d, 6th, 7th and 9th Circuits).

The Fourth Circuit also holds that petitioners should have raised the objection relating to Johnson's ethical violations before the arbitration (A 17), disregarding the crux of the problem in this case, which is the nondisclosure to petitioner. This Fourth Circuit holding is based upon the fact that, after the arbitration was completed, petitioners' counsel was alerted to Johnson's ethical violations, not as he should have been by the Director of Arbitration, but by inquiry pursuant to the NASD's Public Disclosure Program. This holding, if allowed to stand, means that a party may not now rely upon the integrity of information about an arbitrator furnished by the NASD, but must do his own time-consuming and expensive separate background check on the arbitrators. NASD's Public Disclosure Program is unrelated to NASD Arbitration

and is for the entirely different purpose of providing information to the general public "which will help them in their determination whether to conduct or continue to conduct business with an NASD member . . . ." (A 90). That program is not intended for, and generally is not even known by, persons in an arbitration under the NASD Department of Arbitration, which has its own established procedures for providing information regarding arbitrators. See NASD Code §§ 21 and 23 at A 67 and 70. And what about NASD's obligation to provide relevant information, even that which might be in its files in another of its departments? "The law is not tender toward those who fail in their responsibility to exercise the necessary good faith in their dealings with others." Middlesex, 675 F.2d at 1204 (citation omitted). Nor should the law be harsh

toward an innocent party harmed by the failure of another.

The Fourth Circuit holding is totally at odds with governing NASD Code §§ 21 and 23, which place upon both the individual arbitrator and the NASD the burden of disclosing "any circumstances which might preclude such arbitrator from rendering an objective and impartial determination." (NASD Code § 23(a) at A 70). The burden is not upon a party to search behind information provided by the arbitrators and the NASD. This Fourth Circuit ruling guts the concept of arbitration, which is to provide a convenient and less expensive way to resolve disputes. As this Court said in Commonwealth:

> We can perceive no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias. 393 U.S. at 149.

The Fourth Circuit ruling is in conflict with the Eleventh Circuit which holds:

> The law does not require that [a party to arbitration] ascertain whether an arbitrator has violated his duty of disclosure. Such a procedure would be prohibitively time consuming and costly. It would also frustrate the goal of arbitration which is to expedite the resolution of disputes and to decrease the cost of litigation. Middlesex 675 F.2d at 1203.

The law in the Sixth Circuit is in accord with Middlesex:

> The successful party in the grievance may not rely on the failure to object for bias, however, unless "[a]ll the facts now argued as to [the] alleged bias were known . . . at the time the [arbitration panel] heard their grievances." Apperson, 879 F.2d at 1359 (citations omitted).

Remmey had a right to the information concerning Johnson's ethical violations. With that information she would have had grounds to challenge Johnson for cause or

to use her peremptory challenge. Failure to have that information disclosed to her violated her rights under any concept of due process of law. Compare Rogers, 165 F.Supp. at 300, which (under a different type arbitration procedure) held that a party, who may have a sensitivity to the disclosure not realized by the appointing authority, should not be deprived of at least the opportunity to convince the appointing authority of the desirability of selecting an arbitrator replacement.

This Court has noted the "strict morality and fairness . . . expected on the part of the arbitrator." Commonwealth, 393 U.S. at 148. Here, not only is the fact of the undisclosed infractions important. Equally important as the infractions is the fact that Johnson provided a false answer concealing them. A false answer is much more significant than a "simple failure to

respond." Pierce v. Altman, 147 Ga. App. 22, 248 S.E.2d 34, 36 (1978). The Fourth Circuit is condoning this false answer, in clear violation of petitioners' right to an arbitration untainted by partiality or fraud. See 9 U.S.C. § 10(a)(1), (2), (3).

This Court has held that the arbitration must not only "be unbiased but must avoid even the appearance of bias." Commonwealth, 393 U.S. at 150. The Fourth Circuit intimates that the nondisclosure of a financial interest here might have been grounds for vacatur. (A 16-17). In any rational system of justice, how can a falsification and resulting nondisclosure of ethical violations be any less a ground for vacatur under 9 U.S.C. § 10(a)?

C. The "Public" Arbitrators

The contract to arbitrate in this case required that it be done "in accordance with the rules, then obtaining" of the

NASD. (A 92). Failure to conduct the arbitration in accordance with arbitral rules goes to the integrity of the body designed to resolve the controversy and fails to protect "due arbitration process." Rogers, 165 F. Supp. at 301. See also American Guar. Co. v. Caldwell, 72 F.2d 209, 212 (9th Cir. 1934); Cox v. Cox, 33 N.C. App. 73, 234 S.E.2d 189, 190 (1977). It is an arbitration result obtained by "undue means" within the meaning of 9 U.S.C. 10(a)(1).

Without the return of the sworn arbitrator questionnaires, there was no procedural basis on which NASD could qualify either Schwimmer or Lewis as public arbitrators, and their appointments violated Mrs. Remmey's right to procedural due process.

The Fourth Circuit ignored NASD's violations, stating that petitioners'

counsel had conceded that no NASD rule required return of the questionnaire. Respectfully, counsel conceded only that the published NASD Code of Arbitration Procedure did not, by its terms, refer to or require return of the sworn, updated questionnaires. But that has nothing to do with the fact that when NASD appointed Schwimmer and Lewis as public arbitrators, without sworn substantiation of their qualifications, that organization violated its own internal operating policies, mandated by the SEC, as set forth in NASD's Memorandum of March 26, 1990. NASD's failure to obtain from the arbitrators the questionnaires it required foreclosed any possibility that NASD could classify these panelists as public arbitrators in compliance with its Code of Arbitration Procedure, which was central to the contract with Mrs. Remmey.

The Fourth Circuit's superficial reasoning that Mrs. Remmey must establish that "failure to complete the questionnaire impaired the ability of the arbitrators to render a fair decision" sidesteps the significance of the failure of due process in this case. It is of a piece with the same erroneous reasoning as to arbitrator Johnson, ignoring Affiliated Ute and Commonwealth, supra.

The Court below recited the usual deference to arbitration--that the courts are not to determine whether the arbitrators were right or wrong, but simply whether they carried out an arbitration. (See, e.g., A 8). But if the NASD does not obtain the credentials of its arbitrators, as mandated by the SEC, NASD's operating procedures and any rule of sensible conduct, prior to selecting and appointing arbitrators, and the courts give great

deference in arbitration matters, who is safeguarding the due process rights of the securities consumer?

Certainly, this matter was arbitrated poorly and incorrectly, and the result was outrageous. Even if Mrs. Remmey had been a healthy, fully competent, youthful investor, the sale to her of limited partnerships which used 65% of her assets was in gross violation of provisions relating to investment "suitability" in the ethical rules set out in NASD's Rules of Fair Practice. (See, e.g., Art. III, Sec. 2 and Appendix F, Sec. 3, A 73-5). Also compare this case with, for example, SEC v. Prudential Securities, Inc., 1993 CCH Fed. Sec. L. Rep. Transfer Binder ¶ 97,780, in which Prudential consented to an open-ended settlement of a minimum $330,000,000 in a class action involving

But leaving aside the particular result in this matter, it is surely taking the judicial "hands off" policy too far when arbitrators who were improperly appointed to their positions may render any arbitration decision. It is certainly not established that arbitrators Schwimmer and Lewis were qualified to conduct this arbitration as public arbitrators. Yet the Fourth Circuit elaborated on the "suitable credentials" of these panelists, stating, in part, "There can be little question that Messrs. Schwimmer and Lewis were qualified to address Remmey's claims against Marks and PaineWebber." (A 12-13). It even appeared to wax indignant on Mr. Lewis' behalf, stating that "[w]e have no reason to characterize as an "industry arbitrator" someone whose professional career was largely spent in enforcing state securities laws." (A 14, fn. 3). But that

is not the point. Petitioners are concerned, at a minimum, with whether there was a 20% industry involvement in the last two years violative of NASD Code § 19(c). (A 67).

The fact is that NASD files contained no sworn or properly verified information of any kind on Mr. Schwimmer's qualifications to be an arbitrator. The NASD file on Lewis contained an outdated sworn arbitrator profile and an unsworn document titled "Curriculum Vitae" discussed above, but no response to the March 26, 1990 questionnaire which had as its purpose the determination of the arbitrator's qualifications to be a public arbitrator under the amended NASD Code § 19. These documents, particularly "Curriculum Vitae," which NASD would produce only after the arbitration, pursuant to subpoena, contain information

which raises serious questions whether Lewis could have been classified under the amended Code § 19(c) as a public arbitrator, given his work on boards and panels in the securities industry. At a minimum, this document, had it been timely produced, would have provoked many questions about whether Lewis had acted frequently as an expert witness for securities clients or spent more than 20% of his professional time in the preceding two years for industry clients. To justify an opinion which purports to answer affirmatively that these persons could be classified as public arbitrators, the Fourth Circuit recited nothing but the inadequate information provided petitioners by NASD before the arbitration began. But this information, repeated by the Court, <u>still</u> does not speak to the qualifications of these people as required

by amended NASD Code § 19(c). Information intended to be elicited by the March 1990 questionnaires would have provided the bases for determining qualifications, had the questionnaires been returned. Although the Fourth Circuit presumed to supply the arbitrator qualifications, the NASD never did, and it was certainly NASD's obligation to classify properly these arbitrators in the first instance.

The Fourth Circuit misapprehended the significance of the amended NASD Code and the March 1990 NASD Memorandum and profile questionnaire, which can best be stated by borrowing the words of this Court.

> At issue in this case is the question whether elementary requirements of impartiality taken for granted in every judicial proceeding are suspended when the parties agree to resolve a dispute through arbitration. Commonwealth, 393 U.S. at 145.

Petitioners repeatedly requested the sworn arbitrator questionnaires and other information on the panelists prior to the hearings, in accordance with NASD Code procedures, to no avail. Had NASD done its job, and been forthcoming, the issues raised here would have been resolved prior to the commencement of the arbitration hearings.

Mrs. Remmey's age and condition highlighted the supposed feature of expediency in arbitration. Yet the only way the relevant information could have been obtained prior to arbitration would have been by a time consuming and expensive motion and subpoenas in federal court, which would have been attacked as interlocutory and improper, and certainly would have contradicted the principle that arbitration is supposed to be speedy and

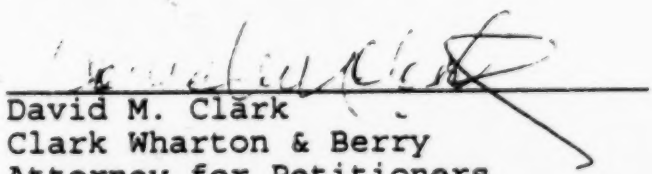
unexpensive. Cf. Middlesex, 675 F.2d at 1203. Compare the Fourth Circuit's "second" bite" theory and its corollary "parade of horribles" (A 10) with practical and more realistic authority holding that action to confirm or vacate an arbitration award is the place for judicial scrutiny of an arbitrator's qualifications. See, e.g., Marc Rich & Co., A.G. v. Transmarine Seawave Corp., 443 F.Supp. 386 (S.D.N.Y. 1978). Also see Commonwealth and Middlesex.

CONCLUSION

In Shearson/Am. Express this Court approved arbitration resolution in securties disputes because self-regulatory organizations (SRO's) such as the NASD are subject to regulation by the SEC, with final oversight by the Courts. Here the Fourth Circuit decision allows an SRO to ignore its own

SEC-mandated rules and condones an arbitration in which the appointment of all three arbitrators was tainted, in one degree or another, by information not disclosed or concealed. This decision by the Fourth Circuit can be understood only by assuming that the Fourth Circuit believes its duty is to leave hands off arbitration matters totally. This Court should grant certiorari to give guidance to the lower courts as to what their duty of oversight is. Surely, it is greater than that afforded by the Fourth Circuit in this case.

Respectfully submitted,



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Supreme Court, U.S.
FILED

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In The
Supreme Court of The United States
October Term 1994

KATHRYN THOMPSON REMMEY and ERNEST M. REMMEY, Executors of the Estate of LOUISE REMMEY, Deceased,
Petitioners,

v.

PAINEWEBBER INCORPORATED and ARNOLD MARKS,
Respondents.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Fourth Circuit

---

APPENDIX

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

KATHRYN THOMPSON REMMEY, Executrix for the Estate of Louise Remmey; ERNEST M. REMMEY, Executor for the Estate of Louise Remmey,	:	
Plaintiffs-Appellants,	:	No. 93-2059
v.	:	
PAINEWEBBER, INCORPORATED; ARNOLD MARKS,	:	
Defendants-Appellees.	:	

Appeal from the United States District Court
for the Middle District of North Carolina,
at Greensboro.
Richard C. Erwin, Senior District Judge.
(CA-90-551-2)

Argued: May 11, 1994

Decided: August 19, 1994

Before ERVIN, Chief Judge,
WILKINSON, Circuit Judge, and ELLIS,
United States District Judge for the
Eastern District of Virginia, sitting
by designation.

Affirmed by published opinion. Judge Wilkinson wrote the opinion, in which Chief Judge Ervin and Judge Ellis joined.

COUNSEL

ARGUED: David McKenzie Clark, CLARK, WHARTON & BERRY, Greensboro, North Carolina, for Appellant. Mack Sperling, BROOKS, PIERCE, MCLENDON, HUMPHREY & LEONARD, L.L.P., Greensboro, North Carolina, for Appellees.

OPINION

WILKINSON, Circuit Judge:

In this case, we are asked to overturn the results of a contractually-compelled arbitration. We decline to do so. Accepting the multiple attacks upon the arbitral process in this case would scuttle the spirit of deference that courts have always used in reviewing arbitral awards. We therefore affirm the judgment of the district court upholding the arbitral decision.

I.

Louise Remmey, the original plaintiff in this case, maintained an account with appellee Arnold Marks at the brokerage firm of Hornblower & Weeks in the late 1970s. In later years, when Marks joined PaineWebber, Inc. as a broker, Remmey transferred her account to that firm. Remmey subsequently opened a Resource Management Account ("RMA") at PaineWebber, thereby allowing the company to hold securities for her and creating an interest-bearing checking account into which her dividends could be deposited.

In connection with the RMA, Remmey signed a "Client's Agreement," which included a requirement that controversies between Remmey and PaineWebber be submitted to arbitration. The provision stated essentially that arbitrations would be conducted in accordance with the rules of the New York Stock Exchange, American Stock Exchange, or National Association of

Securities Dealers. Remmey was permitted to elect which organization's rules would govern.

In early 1986, Remmey began using the RMA to keep track of her investments, and accordingly delivered most of her securities to Marks. From that time until late 1989, Marks conducted a series of trades, which substantially changed Remmey's portfolio mix. Most notably, Marks reduced the level of Remmey's ownership of bonds and other debt instruments, while establishing a significant stake in real estate limited partnerships. In August 1989, Marks left PaineWebber for a position at Prudential Bache.

In October 1990, Mrs. Remmey filed this action against Arnold Marks and PaineWebber in North Carolina federal court. She contended that Marks had knowingly induced her to purchase investments unsuited to her stated objectives and that Marks had

"churned" her account by engaging in excessive and unnecessary trading. PaineWebber responded by pointing to the arbitration clause in the RMA, prompting Remmey to sign a stipulation submitting the case to arbitration and staying the federal court action pending the result. Remmey elected to follow the rules of the National Association of Securities Dealers ("NASD"). In September and December of 1991, a panel of three arbitrators selected by the NASD heard Remmey's claims. After taking evidence for five days, the panel unanimously dismissed all of Remmey's claims against both Marks and PaineWebber.

Shortly thereafter, Remmey moved the district court to set aside the arbitral decision. In support of her motion, Remmey argued that various provisions of the Federal Arbitration Act, 9 U.S.C. §§ 1-16, had been violated. Specifically, Remmey maintained that the arbitrators were biased

in favor of Marks and that their ruling was substantively flawed. In an order of July 15, 1993, the district court rejected Remmey's motion, holding that "the award was proper in all respects." Remmey now appeals.[1]

II.

We must underscore at the outset the limited scope of review that courts are permitted to exercise over arbitral decisions. Limited judicial review is necessary to encourage the use of arbitration as an alternative to formal litigation. This policy is widely recognized, and the Supreme Court has often found occasion to approve it. *See, e.g., Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987); *Southland Corp. v.*

---

[1] On March 20, 1993, prior to the district court's final decision, Mrs. Remmey died. The executors of her estate, Kathryn and Ernest Remmey, were subsequently substituted as plaintiffs. For purposes of this opinion, we will continue to refer to appellant as "Remmey" or "Mrs. Remmey."

Keating, 465 U.S. 1, 10 (1984); *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

A policy favoring arbitration would mean little, of course, if arbitration were merely the prologue to prolonged litigation. If such were the case, one would hardly achieve the "twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation." *Folkways Music Publishers, Inc. v. Weiss*, 989 F.2d 108, 111 (2d Cir. 1993), *petition for cert. filed*, 62 U.S.L.W. 3724 (U.S. Apr. 20, 1994) (No. 93-1650); *see also Eljer Mfg., Inc. v. Kowin Dev. Corp.*, 14 F.3d 1250, 1254 (7th Cir. 1994). Opening up arbitral awards to myriad legal challenges would eventually reduce arbitral proceedings to the status of preliminary hearings. Parties would cease to utilize a process that no longer had finality. To avoid this result, courts have resisted temptations to

redo arbitral decisions. As the Seventh Circuit put it, "[a]rbitrators do not act as junior varsity trial courts where subsequent appellate review is readily available to the losing party." *National Wrecking Co. v. International Bhd. of Teamsters, Local 731*, 990 F.2d 957, 960 (7th Cir. 1993).

Thus, in reviewing arbitral awards, a district or appellate court is limited to determining "'whether the arbitrators did the job they were told to do--not whether they did it well, or correctly, or reasonably, but simply whether they did it.'" *Richmond, Fredericksburg & Potomac R.R. Co. v. Transportation Communications Int'l Union*, 973 F.2d 276, 281 (4th Cir. 1992) (quoting *Brotherhood of Locomotive Eng'rs v. Atchison, Topeka & Santa Fe Ry. Co.*, 768 F.2d 914, 921 (7th Cir. 1985)). Courts are not free to overturn an arbitral result because they would have reached a different conclusion if presented with the

same facts. In the Federal Arbitration Act, 9 U.S.C. §§ 1-16, Congress has limited the grounds upon which an arbitral award can be vacated. Namely, a court may vacate an award:

> (1) Where the award was procured by corruption, fraud, or undue means.
>
> (2) Where there was evident partiality or corruption in the arbitrators, or either of them.
>
> (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
>
> (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a). The statutory grounds for vacutur permit challenges on sufficiently improper conduct in the course of the proceedings; they do not permit rejection of an arbitral award based on disagreement with the particular result the arbitrators

reached. Accordingly, parties may not seek a "second bite at the apple" simply because they desire a different outcome. "To permit such attempts would transform a binding process into a purely advisory one." *Richmond, Fredericksburg & Potomac*, 973 F.2d at 282.

Finally, we note that arbitration has often been used to resolve securities laws claims brought by disappointed investors against brokerage houses. If all claims arising out of unprofitable investments were subjected to the full rigors of litigation, the result could well be increased brokerage transactions costs that would ultimately redound to the detriment of the investing public. Nothing in the Federal Arbitration Act or the various securities laws suggests that arbitral proceedings are inappropriate in this setting. *See Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989) (holding that agreements to

arbitrate claims under the Securities Act of 1933 are enforceable); *McMahon*, 482 U.S. at 238 (holding that claims under the Securities Fxchange Act of 1934 are arbitrable).

III.

Appellant raises numerous challenges to the arbitral decision in this case. We address each issue in turn.

A.

Remmey's first line of attack focuses upon the arbitrators themselves. She claims that none of them were qualified to serve on the panel that heard her case. NASD Code of Arbitration Procedure § 19(b) requires that the majority of the panel members in controversies exceeding $30,000 "not be from the securities industry" unless the customer requests otherwise. Remmey maintains that potential arbitrators were required to complete questionnaires distributed by the NASD in 1990 in order to qualify as "public"

arbitrators. She concludes that the failure of arbitrators Victor Schwimmer and Stanley Lewis to submit the 1990 questionnaires barred them from service on the arbitral panel, and thus that the award was obtained by "undue means" in violation of 9 U.S.C. § 10(a)(1).

This assertion is without merit. As an initial matter, both Schwimmer and Lewis presented suitable credentials to serve on the panel. Mr. Schwimmer is an attorney who worked several years for the Securities and Exchange Commission, nearly thirty years in private practice, and an additional thirteen years as an administrative law judge for the City of New York. Mr. Lewis served sixteen years as Deputy Securities Commissioner for the state of South Carolina. Prior to that, he worked as a securities examiner in the state's Securities Division and as a stockbroker. There can be little question that Messrs. Schwimmer and Lewis were

qualified to address Remmey's claims against Marks and PaineWebber.

More significantly, nothing in the rules governing NASD arbitrations supports Remmey's contention. While she is correct in noting that § 23 of the NASD Code of Arbitration Procedure requires each arbitrator to disclose any interest in the outcome of the arbitration,[2] the Code does

---

[2] Section 23 provides, in pertinent part:

> (a) Each arbitrator shall be required to disclose to the Director of Arbitration any circumstances which might preclude such arbitrator from rendering an objective and impartial determination. Each arbitrator shall disclose:
>
> > (1) Any direct or indirect financial or personal interest in the outcome of the arbitration;
> >
> > (2) Any existing or past financial, business, professional, family, or social relationships that are likely to affect impartiality or might reasonably create an appearance of partiality or bias. Persons requested to serve as arbitrators should disclose any such relationships that they personally have with any party or its counsel, or with any individual whom they have been

not make any mention of the 1990 questionnaire. In fact, appellant's counsel conceded at oral argument that no NASD rule required return of the questionnaire form. In order to overturn the award, Remmey must establish that a failure to complete the questionnaire impaired the ability of the arbitrators to render a fair decision. She has made no showing that failure to complete the questionnaire in any way resulted in a decision obtained by "undue means." *See* 9 U.S.C. § 10(a)(1).[3]

> told will be a witness. They should also disclose any such relationship involving members of their families or their current employers, partners, or business associates.
>
> (b) Persons who are requested to accept appointment as arbitrators should make a reasonable effort to inform themselves of any interests or relationships described in Paragraph (a) above.

[3] Remmey contends that Lewis may have been disqualified as a public arbitrator had he returned the questionnaire. This argument is based on pure speculation. We have no reason to characterize as an "industry arbitrator" someone whose

Appellant is even more critical of arbitrator Marshall Johnson, the so-called "industry" arbitrator. Remmey alleges that Johnson was disciplined by the NASD for noncompliance with the NASD's Rules of Fair Practice, and that Johnson failed to indicate this discipline on his arbitrator questionnaire. Indeed, in 1978, Johnson and his brokerage firm, McDaniel Lewis & Co., agreed to a $500 fine for failing to keep the firm's books current, to liquidate several transactions, and to maintain adequate supervisory procedures. Johnson and his firm were fined again in 1980, in the amount of $1000, for placing identification labels over the names of managing underwriters in a number of offerings.[4]

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professional career was largely spent in enforcing state securities laws.

[4] Regardless of whether NASD rules strictly require disclosure of an arbitrator's past NASD disciplinary infractions, it seems apparent that public confidence in the NASD arbitration process

Not surprisingly, the parties differ as to the significance of these infractions. Appellants contend they were major infractions. Appellees insist they were of a minor and technical nature, and point out that they all occurred more than twelve years before the arbitration proceedings even took place. We need not resolve that issue, however, because Remmey has not shown that these infractions affected Johnson's impartiality, thereby yielding an impermissible award. Section 23 of the NASD Code requires arbitrators to disclose information which would affect their ability to decide the case impartially, such as a financial interest in the outcome. Johnson fully disclosed information he believed relevant to Remmey's claim, namely that his children were then working for Prudential Bache, Marks' current employer. After this

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would be enhanced if such information were not only available to the parties, but was in fact actually conveyed to them.

disclosure, Remmey did not exercise a peremptory challenge to Johnson, as she was permitted to do under the NASD's rules, *see* NASD Code of Arb. Proc. § 22, and she agreed to go forward with the arbitration. It would be improper to vacate an award as obtained by "undue means," 9 U.S.C. § 10(a)(1), when the information relating to Johnson's interest in the outcome was freely disclosed to Remmey before she gave her final consent to the process.

Even if appellant could demonstrate that Johnson's discipline in 1980 somehow affected his impartiality, she fails to provide us with a reason why this objection was not raised prior to the arbitration. Remmey obtained the information concerning Johnson's discipline pursuant to the NASD's "Public Disclosure Program." Although Remmey did not avail herself of this program until after the completion of the arbitration process, the program was at her

disposal before the arbitration began and nothing prevented Remmey from using it before participating in the arbitration. By raising this claim only after obtaining an adverse decision, Remmey's actions appear to constitute the ultimate attempt at a second bite. If this challenge were sustained, nothing would stop future parties to arbitration from obtaining allegedly disqualifying information, going through with the proceedings, and then coming forward with the information only if disappointed by the decision.

B.

Appellant next argues that the arbitral proceeds were conducted in a biased manner in violation of 9 U.S.C. § 10(a)(2) & (a)(3). In support of this contention, she claims that arbitrator Schwimmer, who chaired the panel, was especially solicitous of the defendants' well-being and made several comments throughout the proceedings

indicative of his empathy for the defendants. She also points to an alleged *ex parte* communication between Schwimmer and the defendants' counsel.

In attempting to secure vacatur of the arbitral decision based on "evident partiality," appellant carries a significant burden. "It is well established that a mere appearance of bias is insufficient to demonstrate evident partiality. Arbitrators are not held to the ethical standards required of Article III judges . . . ." *Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co.*, 991 F.2d 141, 146 (4th Cir. 1993) (citations omitted); *see also Health Servs. Mgmt. Corp. v. Hughes*, 975 F.2d 1253, 1264 (7th Cir. 1992). Accordingly, appellant "must establish specific facts that indicate improper motives on the part of an arbitrator." *Peoples Sec.*, 991 F.2d at 146. Here, Remmey's evidence amounts to nothing more than an after-the-fact attack

upon an arbitrator's informal manner. Arbitrators are not strapped to a single presiding style, any more than are judges. Schwimmer's attempt to create a relaxed atmosphere did not indicate a bias in favor of either party. A review of the record indicates that his style, although colloquial, was consistent throughout the proceedings. It was no more a sign of bias for Schwimmer to tell Mr. Marks to "enjoy a wedding" than it was for him to tell appellant's step-daughter she was "with friends." His humor--or attempts at humor--were even directed at himself.[5] There is no indication, however, that he took the

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[5] After one of appellant's witnesses testified that people's dispositions change as they grow older, Schwimmer, who was then 88-years-old, quipped "Nothing personal intended, I hope." Remmey makes much of Schwimmer's age, referring to it several times in her brief. At one point, she even contends that the appointment of an 88-year-old arbitrator was violative of due process. Despite these assertions, however, a review of relevant portions of the transcript shows that Schwimmer was on top of the proceedings.

proceedings less than seriously: he devoted five days to the introduction of evidence and sustained objections from both parties as to evidence and questions put forward by the other.

Appellant's evidence regarding alleged *ex parte* contacts is equally uncompelling. Remmey points chiefly to a statement made by Schwimmer regarding seating at the proceedings. Apparently, the number of people present in the motel hearing room led to crowded conditions. At one point, during cross-examination of plaintiff's expert witness, plaintiff's counsel asked if he could switch seats with defense counsel so that plaintiff's expert and the opposing attorney would not be so close to one another. In refusing the request for a seating change, Schwimmer commented that he had talked with the defendants' counsel, who "promised to be a good boy." Remmey's contention that this statement evidences a

prejudicial *ex parte* conversation is unconvincing for two reasons. First, given Schwimmer's lighthearted style throughout the proceedings, it is unclear whether Schwimmer even had a conversation with defense counsel, and Remmey has failed to present any evidence that such a conversation occurred. Second, assuming that Schwimmer did engage in such a conversation, appellant has failed to show that any remarks regarding seating would have prejudiced her case. Failure to make such a showing bars vacatur of the arbitral award because "the party seeking a vacation of an award on the basis of ex parte conduct must demonstrate that the conduct influenced the outcome of the arbitration." ***M & A Elec. Power Coop. v. Local Union No. 702, Int'l Bhd. of Elec. Workers***, 977 F.2d 1235, 1238 (8th Cir. 1992); ***see also Employers Ins. of Wausau v. National Union Fire Ins. Co. of Pittsburgh***, 933 F.2d 1481, 1490-91

(9th Cir. 1991); *Mutual Fire, Marine & Inland Ins. Co. v. Norad Reinsurance Co.*, 868 F.2d 52, 57 (3d Cir. 1989). Indeed, the decision of who sits where during a proceeding is a classic discretionary call for a presiding officer. Remmey's attempt to elevate this innocuous matter into a basis for overturning the entire arbitral result is indicative of a scatter-shot attack on an adverse decision.

C.

Appellant next claims that the award must be vacated because the arbitrators "manifestly disregarded" the law in reaching their decision. *See National Wrecking*, 990 F.2d at 961. She contends that Marks' actions--including churning her account and purchasing entirely unsuitable investments--were so blatantly illegal that the arbitrators must have ignored the law in failing to grant her a favorable award.

In making a claim based on "manifest disregard," an appellant once again shoulders a heavy burden. We have previously explained that an arbitration panel's interpretation of the law will not be reversed unless the "'arbitrators understand and correctly state the law, but proceed to disregard the same.'" *Upshur Coals Corp. v. United Mine Workers of Am., Dist. 31*, 933 F.2d 225, 229 (4th Cir. 1991) (quoting *San Martine Compania de Navegacion, S.A. v. Saguenay Terminals Ltd.*, 293 F.2d 796, 801 (9th Cir. 1961)). Accordingly, a court's belief that an arbitrator misapplied the law will not justify vacation of an arbitral award. Rather, appellant is required to show that the arbitrators were aware of the law, understood it correctly, found it applicable to the case before them, and yet chose to ignore it in propounding their decision. *See National Wrecking*, 990

F.2d at 961; *Folkways Music*, 989 F.2d at 111-12.

Remmey can make no such showing here. Over the course of five days, the panel heard evidence regarding the investments from both parties. Remmey argued to the arbitrators that she was an elderly woman, burdened with medical problems, and an easy target for Marks' manipulation. She contended that the investments purchased for her account were illiquid and excessively risky, and clearly conflicted with her goals of stability and income flow. She particularly stressed the inappropriateness of buying real estate limited partnerships for a woman of her age. Remmey further argued that her account was overtraded, and that proceeds from the sale of some investments were used to purchase substantially similar securities. Defendants responded by presenting evidence that the purchased investments were

well-suited to Remmey. The limited partnerships, for example, met Remmey's stated goals because they had the potential both to generate income and to realize long-term appreciation. Defendants contended that Marks discussed each purchase with Remmey before it was made, and that Remmey was a resolute businesswoman who kept detailed ledgers of her investments and who visited the PaineWebber office on a weekly basis. Defendants presented further evidence that the purchased partnerships were well syndicated, that the annual turnover rate in the account was far below what courts have found indicative of churning, and that some investments were sold, not to purchase inappropriate securities, but because they were starting to generate a return of principal and, therefore, a drop in Remmey's income. Defendants also noted Marks' previously unblemished record--in his 34 years in the

securities business, no one had brought a customer complaint against him prior to this action.

Thus, by the conclusion of the hearings, the arbitrators had substantial conflicting testimony which could support a decision for either of the parties. Appellant overlooks this fact and relies exclusively on testimony favoring her claims in concluding that the arbitrators ignored the law. Remmey fails to recognize that the arbitrators may well have chosen to credit evidence presented by defendants that the account was not churned, that the investments were suitable, that Remmey's liquidity was maintained, and that Remmey was competent to assess her investments. Given that the arbitrators were presented evidence upon which such conclusions could be based, we cannot simply assume that they ignored the law in reaching their conclusions.

D.

Appellant's final challenges to the arbitration award are that it is void because it (1) violates public policy, and (2) fails to constitute a "mutual, final, and definite award" as required by 9 U.S.C. § 10(a)(4). Both of these arguments are without merit.

Remmey's public policy argument is again based on a one-dimensional view of the evidence. Remmey argues that Marks' sale of limited partnerships to her without delivering current prospectuses was a violation of criminal law, *see* 15 U.S.C. § 77e, and therefore that the award in favor of Marks directly conflicts with a defined statutory mandate. What appellant fails to produce, however, is any evidence that the arbitrators found a violation of the securities laws. In a case such as this, where the arbitrators were presented with conflicting evidence on this point, there is

no reason to assume that they accepted appellant's version of the facts. Rather, the arbitral award reflects the conclusion that Marks did not make the sales without first delivering current prospectuses. The arbitrators were free to reach this conclusion, and having done so, their award does not conflict with any established public policy.

Remmey's § 10(a)(4) argument also fails. The arbitral ruling states, quite unambiguously, that "All Claims of the Claimant, Louise Remmey, against Respondents, PaineWebber, Inc. and Arnold Marks, shall be and are hereby dismissed in all respects." This statement of an arbitral decision could hardly be more final and definite. *See Antwine v. Prudential Bache Sec., Inc.*, 899 F.2d 410, 413 (5th Cir. 1990) (holding that a similar award satisfied the "mutual, final and definite" requirements). That the arbitrators'

accompanying "Case Summary" did not mention all of Remmey's claims is of no moment here. After all, the Supreme Court has held that arbitrators need not state reasons for reaching a particular result. *See United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 598 (1960). Remmey's § 10(a)(4) argument appears to be merely a final attempt to secure a second shot at a recovery.

IV.

There is no doubt that the arbitrators in this case were presented with evidence that could have supported an award in favor of either of the parties. As a result, it is entirely understandable that Remmey would be disappointed with their conclusion. It is not our function as a reviewing court, however, to revisit the arguments and evidence presented to the arbitrators. Rather, our role is limited to determining whether the arbitration process itself was

flawed. Here, evidence of such a flaw is lacking, and therefore the arbitral result may not be disturbed.

For the foregoing reasons, the judgment of the district court denying appellant's motion to vacate the arbitration award is

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

GREENSBORO DIVISION

LOUISE REMMEY,	:	
	:	
Plaintiff,	:	
	:	
v.	:	2:90CV00551
	:	
PAINEWEBBER, INC., and ARNOLD MARKS,	:	
	:	
Defendants.	:	

MEMORANDUM OPINION

ERWIN, Senior Judge

In this civil action which was filed on October 29, 1990, plaintiff seeks recovery

from defendants Arnold Marks, an individual stockbroker, and his employer, Painewebber, for fraud under both federal and state laws, breach of fiduciary duty, and negligence. Before answering the complaint, counsel for Painewebber presented plaintiff's counsel a purported contract signed by Mrs. Louise Remmey in 1984 agreeing to arbitrate any controversies which might arise out of her brokerage account with defendants. The parties agreed to allow arbitration of the dispute.

Accordingly, it was decided, in the interest of allowing the matter to go forward without the delay and added expense of litigating the validity of the arbitration agreement, that a stipulation allowing arbitration would be signed. Thereafter, in accordance with arbitration procedure, plaintiff presented a statement of claim, and defendants filed a response.

The Arbitrators

The contract signed by Mrs. Remmey which provided for arbitration allowed her to choose from arbitration panels provided either by the New York Stock Exchange (NYSE), the National Association of Securities Dealers (NASD), or the Chicago Board of Options Exchange (CBOE). The CBOE was obviously inappropriate since options were not involved. The NYSE indicated that its arbitration sessions would be held in Charlotte or in Raleigh. The administrator for the NASD advised that arbitration hearings, if the NASD was chosen, would be held in Greensboro. Accordingly, plaintiff chose the NASD.

The proposed panelists, whose names were submitted by NASD, were H. Victor Schwimmer, former administrative law judge of New York City, Chairman; Stanley V. Lewis, a former Deputy Securities Commissioner from South Carolina, who

previously worked in the securities business after completion of two years at Guilford College; and Drew Waterbury, a person currently employed in the securities industry with a firm known as Quick and Riley, location undisclosed.

By August 29, 1991, before the initial arbitration hearings began on September 11, 1991, the parties were informed that Drew Waterbury had withdrawn from the panel and that Marshall H. Johnson, McDaniel Lewis & Company, Greensboro, North Carolina, had been substituted in his place. Plaintiff's counsel was informed by telephone by the NASD administrator, Ms. June Riley, that one of Mr. Johnson's children worked as a broker at Prudential Bache, the firm where Marks was then employed. When plaintiff's counsel expressed dissatisfaction with the panel, he was told by Ms. Riley that unless this panel was satisfactory, it would be necessary to move the arbitration from Greensboro, since

she could not obtain arbitrators willing to come to Greensboro. Ms. Riley reported verbally that Arbitrator Johnson had indicated that the presence of his family members at Prudential Bache would not affect his fairness at the hearing. Plaintiff does not now contend that such relationship had any bearing on the outcome of this case.

The Award

Plaintiff Louise Remmey, alleged that defendant Arnold Marks (Marks), a broker at Painewebber, Inc., churned her account which she opened at Painewebber at the beginning of 1987. Plaintiff, a widow who is eighty-six years old, further alleged that she is of ill health and that defendants were aware of her deteriorating mental and physical capacities but nevertheless sold most of her high-quality, high-yield investments, frequently at a loss, and purchased for her account illiquid, speculative, and high risk investments such

as limited partnerships and equity and bond funds that were unsuitable and not in keeping with her investment objectives. Plaintiff stated that a result of Marks' conduct, she sustained great realized losses from transactions in her account and that Painewebber is liable for the activities of its agent, Marks.

Defendants Painewebber, Inc. and Arnold Marks denied the allegations contained in the Statement of Claim and stated that they are not liable to plaintiff for losses in any amount. Defendants maintained that plaintiff was a knowledgeable investor with a desire to generate income and a hope to realize long term appreciation in her account and that Marks' handling of her account was consistent with both objectives. Defendants further maintained that upon a full analysis of plaintiff's account, it would be demonstrated that plaintiff realized substantial profits.

After considering the pleadings, the testimony, and the evidence presented at the hearing, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. All claims of plaintiff Louise Remmey against defendants Painewebber, Inc. and Arnold Marks shall be and are hereby dismissed in all respects.

2. The parties shall each bear their own costs including attorneys' fees.

Discussion

The plaintiff alleged in her complaint that 9 U.S.C.A. § 10 (1947) has been violated by defendants and that the award entered by the arbitrators should be vacated.

This court agrees with the rule of law as stated by District Court Judge Hamilton (now United States Circuit Judge) in Atlantic Shores Resort v. Martin, 731 F.

Supp. 1279, 1282 (D.S.C. 1990). "Perhaps most important, the burden of proof falls squarely on the party moving to vacate the arbitration award, see Andros Compania Maritima v. Marc Rich & Co., A.G., 579 F.2d 691, 700 (2d Cir. 1978), who must "establish substantially more than an erroneous conclusion of law or fact."

Section 10 of the Act provides:

> (a) Where the award was procured by corruption, fraud, or undue means.
>
> (b) Where there was evident partiality or corruption in the arbitrators, or either of them.
>
> (c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
>
> (d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.
>
> (e) Where an award is vacated and the time within which the agreement required the award to be made has not

> expired, the court may, in its discretion, direct a rehearing by the arbitrators.

The plaintiff contends that Arbitrator Johnson's falsification of his sworn application is misconduct and that the ex parte contacts by Arbitrator Schwimmer with defense counsel and/or defendant Marks was sufficient to show prejudicial behavior. These contentions arose prior to arbitration. They were not settled. The plaintiff brought them forward at the arbitration proceedings. The plaintiff attempted to gain additional information with reference to the arbitrators, but such was not received at the date the arbitration began; but nevertheless, plaintiff proceeded with the hearing.

The arbitrators' award as set out above was summary in nature and without findings of fact. However, the law in this event concludes that any alleged bias on the part of the arbitrators cannot be the bias for

vacating an award unless the interest or bias is "direct, definite and capable of demonstration rather than remote, uncertain, or speculative." Atlantic Shores Resort v. Martin, 731 F. Supp. at 1283. The evidence does not suggest this standard. The evidence does not support a violation under Section 10 of the Act.

Standard of Review

> The bases for review of arbitration awards are enumerated in 9 U.S.C. § 10, supra . . . . The statute does not allow courts to roam unbridled in their oversight of arbitral awards, but carefully limits judicial intervention to instances where the arbitration has been tainted in certain specific ways. In fine, section 10 authorizes vacatur of an award in cases of specified misconduct or misbehavior on the arbitrators' part, actions in excess of arbitral powers, or failure to consummate the award." See, Carte Blanche (Singapore) Pte., Ltd. v. Carte Blanche Int'l Ltd., 888 F.2d 260, 264-65 (2d Cir. 1989). The statute contains no express ground upon which an award can be overturned because it rests on garden-variety factual or legal bevues. To the precise contrary, courts "do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts." United Paperworkers Int'l Union v. Misco,

> Inc., 484 U.S. 29, 38, 108 S.Ct. 364, 371, 98 L.Ed.2d 286 (1987). Even where such error is painfully clear, "courts are not authorized to reconsider the merits of arbitration awards . . . ." S.D. Warren Co. v. United Paperworkers' Int'l. Union, Local 1069, 845 F.2d 3, 7 (1st Cir.), cert. denied, 488 U.S. 992, 109 S.Ct. 555, 102 L.Ed.2d 582 (1988).

Advest v. McCarthy, 914 F.2d 6, 8 (1st Cir. 1990).

The court notes that evidence was taken over a course of four days. The evidence presented by the parties conflicted; the results being that the arbitrators could find facts inconsistent with contentions from either party.

As bad as the plaintiff contends her case is and her desire to have the award vacated, the court must deny the same and hold that the award was proper in all respects. A Judgment will be rendered contemporaneously herewith.

Richard C. Erwin

United States District Judge

December 14, 1992.

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

GREENSBORO DIVISION

LOUISE REMMEY,	:	
	:	
Plaintiff,	:	
	:	
v.	:	2:90CV00551
	:	
PAINEWEBBER, INC., and ARNOLD MARKS,	:	
	:	
Defendants.	:	

FINAL JUDGMENT

The arbitration award appealed from by the plaintiff is hereby confirmed in all respects and is hereby considered as the Judgment of this court. Each party will pay its own cost.

IT IS SO ORDERED.

Richard C. Erwin

United States District Judge

December 14, 1992

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

GREENSBORO DIVISION

KATHRYN THOMAS (sic) REMMEY and ERNEST M. REMMEY, Executors of the Estate of LOUISE REMMEY, deceased,	:	
Plaintiffs,	:	
v.	:	2:90CV00551
PAINEWEBBER, INC., and ARNOLD MARKS,	:	
Defendants.	:	

SUBSTITUTE JUDGMENT

In this civil action which was filed on October 29, 1990, Mrs. Louise Remmey seeks recovery from defendants Arnold Marks, an individual stockbroker, and his employer, Painewebber, for fraud under both federal and state laws, breach of fiduciary duty,

and negligence. Before answering the complaint, counsel for Painewebber presented Mrs. Remmey's counsel a purported contract signed by her in 1984 agreeing to arbitrate any controversies which might arise out of her brokerage account with defendants. The parties agreed to allow arbitration of the dispute.

Accordingly, it was decided, in the interest of allowing the matter to go forward without the delay and added expense of litigating the validity of the arbitration agreement, that a stipulation allowing arbitration would be signed. Thereafter, in accordance with arbitration procedure, Louise Remmey presented a statement of claim, and defendants filed a response.

The Arbitrators

The contract signed by Mrs. Remmey which provided for arbitration allowed her to choose from arbitration panels provided

either by the New York Stock Exchange (NYSE), the National Association of Securities Dealers (NASD), or the Chicago Board of Options Exchange (CBOE). The CBOE was obviously inappropriate since options were not involved. The NYSE indicated that its arbitration sessions would be held in Charlotte or in Raleigh. The administrator for the NASD advised that arbitration hearings, if the NASD was chosen, would be held in Greensboro. Accordingly, Mrs. Remmey with counsel chose the NASD.

The proposed panelists, whose names were submitted by NASD, were H. Victor Schwimmer, former administrative law judge of New York City, Chairman; Stanley V. Lewis, a former Deputy Securities Commissioner from South Carolina, who previously worked in the securities business after completion of two years at Guilford College; and Drew Waterbury, a person currently employed in the securities

industry with a firm known as Quick and Riley, location undisclosed.

By August 29, 1991, before the initial arbitration hearings began on September 11, 1991, the parties were informed that Drew Waterbury had withdrawn from the panel and that Marshall H. Johnson, McDaniel Lewis & Company, Greensboro, North Carolina, had been substituted in his place. Mrs. Remmey's counsel was informed by telephone by the NASD administrator, Ms. June Riley, that one of Mr. Johnson's children worked as a broker at Prudential Bache, the firm where Marks was then employed. When Mrs. Remmey's counsel expressed dissatisfaction with the panel, he was told by Ms. Riley that unless this panel was satisfactory, it would be necessary to move the arbitration from Greensboro, since she could not obtain arbitrators willing to come to Greensboro. Ms. Riley reported verbally that Arbitrator Johnson had indicated that the presence of

his family members at Prudential Bache would not affect his fairness at the hearing. The substitute plaintiffs do not now contend that such relationship had any bearing on the outcome of this case.

The Award

Mrs. Louise Remmey alleged that defendant Arnold Marks (Marks), a broker at Painewebber, Inc., churned her account which she opened at Painewebber at the beginning of 1987. Mrs. Louise Remmey, a widow who was eighty-six years old at the time, alleged that she was of ill health and that defendants were aware of her deteriorating mental and physical capacities but nevertheless sold most of her high-quality, high-yield investments, frequently at a loss, and purchased for her account illiquid, speculative, and high-risk investments such as limited partnerships and equity and bond funds that were unsuitable and not in keeping with her investment

objectives. She stated that a result of Marks' conduct, she sustained great realized losses from transactions in her account and that Painewebber is liable for the activities of its agent, Marks.

Defendants Painewebber, Inc. and Arnold Marks denied the allegations contained in the Statement of Claim and stated that they are not liable for losses in any amount. Defendants maintained that Mrs. Remmey was a knowledgeable investor with a desire to generate income and a hope to realize long term appreciation in her account and that Marks' handling of her account was consistent with both objectives. Defendants further maintained that upon a full analysis of Mrs. Remmey's account, it would be demonstrated that she realized substantial profits.

After considering the pleadings, the testimony, and the evidence presented at the hearing, the undersigned arbitrators have

decided in full and final resolution of the issues submitted for determination as follows:

1. All claims of Louise Remmey against defendants Painewebber, Inc. and Arnold Marks shall be and are hereby dismissed in all respects.

2. The parties shall each bear their own costs including attorneys' fees.

Discussion

Louise Remmey alleged in her complaint that 9 U.S.C.A. § 10 (1947) has been violated by defendants and that the award entered by the arbitrators should be vacated.

This court agrees with the rule of law as stated by District Court Judge Hamilton (now United States Circuit Judge) in Atlantic Shores Resort v. Martin, 731 F. Supp. 1279, 1282 (D.S.C. 1990).

> Perhaps most important, the burden of proof falls squarely on the party moving to vacate the arbitration award, see Andros Compania Maritima v. Marc Rich & Co., A.G., 579 F.2d 691, 700 (2d

Cir. 1978), who must "establish substantially more than an erroneous conclusion of law or fact. Local Union No. 251 v. Narragansett Improvement Co., 503 F.2d 309, 312 (1st Cir. 1974) (emphasis added).

Section 10 of the Act provides:

> (a) Where the award was procured by corruption, fraud, or undue means.
>
> (b) Where there was evident partiality or corruption in the arbitrators, or either of them (sic)
>
> (c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
>
> (d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.
>
> (e) Where an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

Louise Remmey contends that Arbitrator Johnson's falsification of his sworn

application is misconduct and that the ex parte contacts by Arbitrator Schwimmer with defense counsel and/or defendant Marks was sufficient to show prejudicial behavior. These contentions arose during arbitration. They were not settled. Louise Remmey brought them forward at the arbitration proceedings and attempted to gain additional information with reference to the arbitrators, but such was not received at the date the arbitration began; but nevertheless, she proceeded with the hearing.

The arbitrators' award as set out above was summary in nature and without findings of fact. However, the law in this event concludes that any alleged bias on the part of the arbitrators cannot be the basis for vacating an award unless the interest or bias is "direct, definite and capable of demonstration rather than remote, uncertain, or speculative." Atlantic Shores Resort v.

Martin, 731 F. Supp. at 1283. The evidence does not suggest this standard, neither does it support a violation under Section 10 of the Act.

Standard of Review

> The bases for review of arbitration awards are enumerated in 9 U.S.C. § 10, supra . . . . The statute does not allow courts to roam unbridled in their oversight of arbitral awards, but carefully limits judicial intervention to instances where the arbitration has been tainted in certain specific ways. In fine, section 10 authorizes vacatur of an award in cases of specified misconduct or misbehavior on the arbitrators' part, actions in excess of arbitral powers, or failure to consummate the award. See Carte Blanche (Singapore) Pte., Ltd. v. Carte Blanche Int'l Ltd., 888 F.2d 260, 264-65 (2d Cir. 1989). The statute contains no express ground upon which an award can be overturned because it rests on garden-variety factual or legal bevues. To the precise contrary, courts "do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts." United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 38, 108 S.Ct. 364, 371, 98 L.Ed.2d 286 (1987). Even where such error is painfully clear, "courts are not authorized to reconsider the merits of arbitration awards . . . ." S.D. Warren Co. v. United Paperworkers' Int'l. Union, Local 1069, 845 F.2d 3, 7 (1st Cir.), cert. denied, 488 U.S. 992,

109 S.Ct. 555, 102 L.Ed.2d 582 (1988). (Footnote omitted.)

Advest v. McCarthy, 914 F.2d 6, 8 (1st Cir. 1990).

The court notes that evidence was taken over a course of four days. The evidence presented by the parties conflicted; the results being that the arbitrators could find facts inconsistent with contentions from either party.

As bad as Mrs. Remmey contends her case is and her desire to have the award vacated, the court must deny the same and hold that the award was proper in all respects.

Richard C. Erwin

United States District Judge

July 15, 1993

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

GREENSBORO DIVISION

KATHRYN THOMAS (sic) REMMEY and ERNEST M. REMMEY, Executors of the Estate of LOUISE REMMEY, deceased,	:	
Plaintiffs,	:	
v.	:	2:90CV00551
PAINEWEBBER, INC., and ARNOLD MARKS,	:	
Defendants.	:	

MEMORANDUM AUTHORIZING A SUBSTITUTE JUDGMENT

This case is before the court on motion of plaintiffs which reads: "Plaintiff, pursuant to Federal Rules of Civil Procedure 52(b) and 59, moves the Court to amend its findings and make additional findings and to amend the judgment in the above case accordingly." The court finds that the motion was timely filed.

The court is of the opinion that part of the motion relating to the last paragraph of page 5 of the court's memorandum opinion could be written clearer than it now stands. Therefore, a new page 5 of December 14, 1992 will be substituted in the substitute judgment in this case.

All other contentions of the plaintiffs in the above-described motion have been reviewed by the court, and the court has found all those contentions to be without merit. The court notes that the plaintiffs do not contend that such alleged new affidavits of the plaintiffs will be sufficient to change the judgment heretofore entered. It does appear that the plaintiffs have added a second occasion to argue their original contentions. The court realized that the events contained in this case are difficult for the court; but, nevertheless, the case law and the statute require this result.

IT IS THEREFORE ORDERED that all other contentions of plaintiffs are DENIED as being without merit.

Richard C. Erwin

United States District Judge

July 15, 1993.

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant(s)

Louise Remmey

91-00567

Name of Respondent(s)

PaineWebber, Inc.
Arnold Marks

REPRESENTATION

For Claimant: David M. Clark, Esq. of Clark Wharton & Berry.

For Respondents: Gary J. Stegeland, Esq., in-house Counsel for PaineWebber, Inc.

CASE INFORMATION

Statement of Claim filed: February 21, 1991.

Claimant's Submission agreement signed on: January 17, 1991.

Joint Statement of Answer of Respondents filed on: April 18, 1991.

Respondent, PaineWebber, Inc.'s Submission Agreement signed on: April 8, 1991.

Respondent, Arnold S. Marks' Submission Agreement signed on: April 8, 1991.

HEARING INFORMATION

Hearing Date/Sessions:

September 11, 1991-Two (2) Sessions.

September 12, 1991-Two (2) Sessions.

December 4, 1991-Two (2) Sessions.

December 5, 1991-Two (2) Sessions.

December 6, 1991-Two (2) Sessions.

Total number of hearing sessions - Ten (10) Sessions.

Hearing Location: Greensboro, NC.

CASE SUMMARY

Claimant, Louise Remmey, alleged that Respondent, Arnold Marks (Marks), a broker at PaineWebber, Inc. (PaineWebber) churned her account which she opened at PaineWebber at the beginning of 1987. Claimant, a widow who is 86 years old, further alleged that she is of ill health and that Respondents were aware of her deteriorating mental and physical capacities but nevertheless sold most of her high-quality, high-yield investments, frequently at a loss, and purchased for her account illiquid, speculative and high risk investments such as limited partnerships and equity and bond funds that were unsuitable and not in keeping with her investment objectives. Claimant stated that as a result of Marks' conduct, she sustained great realized losses

from transactions in her account and that PaineWebber is liable for the activities of its agent, Marks.

Respondents, PaineWebber, Inc. and Arnold Marks, denied the allegations contained in the Statement of Claim and stated that they are not liable to Claimant for losses in any amount. Respondents maintained that Claimant was a knowledgeable investor with a desire to generate income and a hope to realize long term appreciation in her account and that Marks' handling of her account was consistent with both objectives. Respondents further maintained that upon a full analysis of Claimants (sic) account it would be demonstrated that Claimant realized substantial profits.

RELIEF REQUESTED

Claimant requested monetary damages of $692,519.00 or in the alternative $481,030.00 and rescission of the limited partnership acquisitions with Respondent,

PaineWebber, Inc. taking back the limited partnership acquisitions. Claimant also requested an award of punitive damages.

Respondents requested that the Statement of Claim be dismissed and that the cost of these proceedings, including attorneys' fees be assessed against Claimant or the party responsible for instituting this suit.

OTHER ISSUES CONSIDERED & DECIDED

The parties have agreed that the Award in this matter may be executed in counterpart copies or that a handwritten, signed Award may be entered. In either case, the parties have agreed to receive conformed copies of the Award while the originals remain on file with the NASD.

AWARD

After considering the pleadings, the testimony and the evidence presented at the hearing, the undersigned arbitrators have decided in full and final resolution of the

issues submitted for determination as follows:

1. All Claims of the Claimant, Louise Remmey, against Respondents, PaineWebber, Inc. and Arnold Marks, shall be and are hereby dismissed in all respects;

2. The parties shall each bear their own costs including attorneys' fees.

FORUM FEES

Pursuant to Section 43c of the Code of Arbitration Procedure, the NASD, Inc. shall retain the $250.00 non-refundable filing fee previously deposited by the Claimant and the following Forum Fees are assessed:

10 Sessions x $1,000.00 = $10,000.00

Forum Fees assessed against:

1- Claimant, in the amount of $5,000.00; however, the NASD, Inc. shall retain the $1,000.00 hearing session deposit previously deposited by Claimant to offset

this fee, thereby the amount due and owing by Claimant equals $4,000.00.

2- Respondent, PaineWebber, Inc., in the amount of $5,000.00.

Fees are payable to the National Association of Securities Dealers, Inc.

ARBITRATION PANEL

H. Victor Schwimmer, Esq. Public/Chairman

Stanley V. Lewis Public/Panelist

Marshall H. Johnson Industry/Panelist

Date of Decision: January 17, 1992

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

Filed September 13, 1994

No. 93-2059
CA-90-551-2

KATHRYN THOMPSON REMMEY, Executrix for the Estate of Louise Remmey; ERNEST M. REMMEY, Executor for the Estate of Louise Remmey
Plaintiffs - Appellants

v.

PAINEWEBBER, INCORPORATED; ARNOLD MARKS
Defendants - Appellees

On Petition for Rehearing With Suggestion for Rehearing In Banc

---

The appellants petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague

CLERK

CONSTITUTION OF THE UNITED STATES

AMENDMENT V

No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

9 U.S.C. § 10

Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration--

(1) Where the award was procured by corruption, fraud, or undue means.

(2) Where there was evident partiality or corruption in the arbitrators, or either of them.

(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

NASD Manual--Code of Arbitration Procedure

Sec. 19. Designation of Number of Arbitrators (b) In arbitration matters involving public customers and where the amount in controversy exceeds $30,000, or where the matter in controversy does not

involve or disclose a money claim, the Director of Arbitration shall appoint an arbitration panel which consists of no fewer than three (3) nor more than five (5) arbitrators, at least a majority of whom shall not be from the securities industry, unless the public customer requests a panel consisting of at least a majority from the securities industry.

(c) An arbitrator will be deemed as being from the securities industry if he or she:

(1) is a person associated with a member or other broker/dealer, municipal securities dealer, government securities broker, or government securities dealer, or

(2) has been associated with any of the above within the past three (3) years, or

(3) is retired (that is, continues to receive compensation,

other than social security or self-funded benefits) from any of the above, or

(4) has a spouse or other member of the household who is a person associated with any of the above, or

(5) is an attorney, accountant, or other professional who has devoted twenty (20) percent or more of his or her professional work effort to securities industry clients within the last two years.

(d) An arbitrator who is not from the securities industry shall be deemed a public arbitrator.

NASD Manual--Code of Arbitration Procedure

Sec. 21. Notice of Selection of Arbitrators

The Director of Arbitration shall inform the parties of the arbitrators' names and employment histories for the past ten

(10) years, as well as information disclosed pursuant to Section 23, at least eight (8) business days prior to the date fixed for the first hearing session. A party may make further inquiry of the Director of Arbitration concerning an arbitrator's background. In the event that prior to the first hearing session, any arbitrator should become disqualified, resign, die, refuse or otherwise be unable to perform as an arbitrator, the Director of Arbitration shall appoint a replacement arbitrator to fill the vacancy on the panel. The Director of Arbitration shall inform the parties as soon as possible of the name and employment history of the replacement arbitrator for the past ten years, as well as information disclosed pursuant to Section 23. A party may make further inquiry of the Director of Arbitration concerning the replacement arbitrator's background and within the time remaining prior to the first hearing session

or the five (5) day period provided under Section 22, whichever is shorter, may exercise its right to challenge the replacement arbitrator as provided in Section 22.

NASD Manual--Code of Arbitration Procedure

Sec. 22. Peremptory Challenge

In any arbitration proceeding, each party shall have the right to one peremptory challenge. In arbitrations where there are multiple Claimants, Respondents and/or Third-Party Respondents, the Claimants shall have one peremptory challenge, the Respondents shall have one peremptory challenge and the Third-Party Respondents shall have one peremptory challenge, unless the Director of Arbitration determines that the interest of justice would best be served by awarding additional peremptory challenges. Unless extended by the Director

of Arbitration, a party wishing to exercise a peremptory challenge must do so by notifying the Director of Arbitration in writing within five (5) business days of notification of the identity of the persons named to the panel. There shall be unlimited challenges for cause.

NASD Manual--Code of Arbitration Procedure

Sec. 23. Disclosures Required of Arbitrators

(a) Each arbitrator shall be required to disclose to the Director of Arbitration any circumstances which might preclude such arbitrator from rendering an objective and impartial determination. Each arbitrator shall disclose:

(1) Any direct or indirect financial or personal interest in the outcome of the arbitration;

(2) Any existing or past financial, business, professional,

family, or social relationships that are likely to affect impartiality or might reasonably create an appearance of partiality or bias. Persons requested to serve as arbitrators should disclose any such relationships that they personally have with any party or its counsel, or with any individual whom they have been told will be a witness. They should also disclose any such relationship involving members of their families or their current employers, partners, or business associates.

(b) Persons who are requested to accept appointment as arbitrators should make a reasonable effort to inform themselves of any interests or relationships described in Paragraph (a) above.

(c) The obligation to disclose interests, relationships, or circumstances that might preclude an arbitrator from

rendering an objective and impartial determination described in subsection (a) hereof is a continuing duty that requires a person who accepts appointment as an arbitrator to disclose, at any stage of the arbitration, any such interests, relationships, or circumstances that arise, or are recalled or discovered.

(d) Prior to the commencement of the first hearing session, the Director of Arbitration may remove an arbitrator based on information disclosed pursuant to this section. The Director of Arbitration shall also inform the parties of any information disclosed pursuant to this Section if the arbitrator who disclosed the information is not removed.

NASD Manual--Rules of Fair Practice

ARTICLE III

Sec. 1. Business Conduct of Members

A member, in the conduct of his business, shall observe high standards of commercial honor and just and equitable principles of trade.

Sec. 2. Recommendations to Customers.

In recommending to a customer the purchase, sale or exchange of any security, a member shall have reasonable grounds for believing that the recommendation is suitable for such customer upon the basis of the facts, if any, disclosed by such customer as to his other security holdings and as to his financial situation and needs.

NASD Manual--Rules of Fair Practice

APPENDIX F

Sec. 3. Suitability

(a) A member or person associated with a member shall not underwrite or participate in a public offering of a direct participation program unless standards of

suitability have been established by the program for participants therein and such standards are fully disclosed in the prospectus and are consistent with the provisions of subsection (b) of this section.

(b) In recommending to a participant the purchase, sale or exchange of an interest in a direct participation program, a member or person associated with a member shall:

(1) have reasonable grounds to believe, on the basis of information obtained from the participant concerning his investment objectives, other investments, financial situation and needs, and any other information known by the member or associated person, that:

(i) the participant is or will be in a financial position appropriate to enable him to

realize to a significant extent the benefits described in the prospectus, including the tax benefits where they are a significant aspect of the program;

(ii) the participant has a fair market net worth sufficient to sustain the risks inherent in the program, including loss of investment and lack of liquidity; and

(iii) the program is otherwise suitable for the participant; and

(2) maintain in the files of the member documents disclosing the basis upon which the determination of suitability was reached as to each participant.

LETTER FROM DAVID M. CLARK

August 7, 1991

FAX NO. 212-858-4389

Ms. June Riley
Arbitration Administrator
National Association of Securities Dealers, Inc.
33 Whitehall Street
Eighth Floor
New York, New York 10004

Re: Louise Remmey v. PaineWebber Incorporated and Arnold Marks
NASD Case # 91-00567

Dear Ms. Riley:

This is further with regard to my request for information about the arbitrators. As you know, the only information so far presented to us is that contained on the so-called arbitrator disclosure sheets, copies of which are attached hereto, and really provide no information. As you know, by letters of July 26 and July 29, 1991, I requested certain additional information.

I now understand that the NASD maintains files on each of the arbitrators. I should like to see the contents of the files on each of the arbitrators named in this case. If there is certain information in those files which the NASD feels would be inappropriate to disclose, this information can be redacted, with a statement as to what type of information is being redacted. Otherwise, I see no reason we should not have access to any information available. For example, and without limitation, I understand that the arbitrators have each filed applications for appointment as arbitrators. I would like to see those applications.

You have certainly been most cooperative and helpful throughout this matter, and I appreciate it.

Sincerely yours,

David M. Clark

mtb

cc: Ms. Debbie Mussuci (via fax)

Mrs. Kaye Grove

LETTER FROM DAVID M. CLARK

August 21, 1991

FAX NO. 212-858-4389

Ms. June Riley, Arbitration Administrator
National Association of Securities Dealers, Inc.
33 Whitehall Street, Eighth Floor
New York, New York 10004

Re: Louise Remmey v. PaineWebbber Incorporated et al
NASD Case # 91-00567

Dear Ms. Riley:

I received today your fax of 19:48 hours on August 19, 1991. The letter you faxed bore a date of August 8, 1991, but I have not received it. Perhaps in the future if you will use our post office box, No. 1349, the regular mail will be delivered more efficiently. I also received by fax

today your indication that the above matter has been rescheduled for September 11, 1991, at Greensboro. You have not indicated where in Greensboro the hearing will be held.

Respectfully, I do not believe the information you have provided as to the arbitrators, Mr. Schwimmer and Mr. Lewis, meets our requests for information as set forth in my previous correspondence. I would appreciate your calling me to discuss the additional information we requested at your earliest convenience. Also, please refer to the second paragraph in my letter of August 7, 1991.

Obviously, we cannot make a choice as to any peremptory challenges with regard to this panel, if any, until the third arbitrator is appointed.

Thank you for your cooperation.

Yours very truly,

David M. Clark

mtb

cc: Ms. Debbie Mussuci (via fax)

Mrs. Kaye Grove

LETTER FROM DAVID M. CLARK

August 27, 1991

FAX NO. 212-858-4389

Ms. June Riley, Arbitration Administrator
National Association of Securities Dealers, Inc.
33 Whitehall Street, Eighth Floor
New York, New York 10004

Re: Louise Remmey v. PaineWebber Incorporated et al
NASD Case # 91-00567

Dear Ms. Riley:

Arbitration in the above case is scheduled to begin on September 11, 1991. I received yesterday for the first time many documents produced by PaineWebber. Even now, I have not received all the documents to which we are entitled. Obviously, this puts us at a considerable disadvantage so far as being prepared is concerned, but I am

continuing to make a good faith effort to meet the schedule if it can be done consistent with the interest of our client.

I would remind you that there still has not been appointed a third arbitrator for this case. Obviously, I cannot know which arbitrators to excuse peremptorily or object to without knowing the full panel. Nor can I ask an arbitrator to settle any discovery disputes until I know which arbitrators will be serving.

This is not your ordinary arbitration. It involves in excess of $500,000. I would ask that you give the matter priority.

I would ask for the third time that you provide for us the information in your files, including the arbitrator's applications, regarding the arbitrators and their background, together with the other information requested by our earlier letters. Anything less will deprive us of

due process. Please respond to this request one way or the other.

Yours very truly,

David M. Clark

mtb

cc: Ms. Debbie Mussuci (via fax)
Garry J. Stegeland (via fax)
Mrs. Kaye Grove

NASD MEMORANDUM

TO: NASD Arbitrator

FROM: Deborah Masucci,
Director of Arbitration

RE: Arbitrator Profile Update

DATE: March 26, 1990

I would like to take this opportunity to thank you for participating in the Association's arbitration program. The success of the program depends in large

measure upon the professionalism you bring to the arbitration forum.

In June 1987, the Supreme Court of the United States had occasion to review the issue of enforcement of arbitration agreements in the Shearson Lehman/American Express, Inc. vs. McMahon case. The Court, in substance, ruled that there is a federal policy favoring arbitration and that the policy requires courts to rigorously enforce arbitration agreements. Their opinion was based on an underlying belief that arbitration 2 (sic) forums provide a fair, just, and prompt resolution of securities disputes.

There was, however, skepticism from both the Court and the Securities and Exchange Commission ("SEC") regarding the perception of fairness in having certain individuals with industry ties classified as public arbitrators. This skepticism was detailed by the SEC in a letter to the NASD and other

self-regulatory organizations recommending certain categories to be excluded from the pool of public arbitrators. After thorough consideration and debate by the National Arbitration Committee, the NASD amended its Code of Arbitration Procedure in response to the SEC's request. On May 10, 1989, the SEC approved these amendments which exclude the following categories of individuals from serving as a public arbitrator.

a. A person associated with a member or other broker/dealer, municipal securities dealer, government securities broker/dealer, or;

b. A person who has been associated with any of the above within the past three (3) years, or;

c. A person who is retired from any of the above, or;

d. An attorney, accountant, or other professional who has devoted twenty (20) percent or more of his

or her individual professional work effort to securities industry clients within the last two years (this does not carry over to other members of the firm who do not have such substantial contacts); (sic) although it must be disclosed);

e. A spouse or other household member of a person who is associated with a member or other broker/dealer, municipal securities dealer, government securities broker/dealer, or;

f. An employee of a bank or other firm (*i.e.*, Sears Roebuck and Prudential Insurance Company) to the extent that their personal employment involvement is with securities activities.

We are developing an updated computer software system to better handle the

processing of NASD arbitrations. The new database requires some additional information from our arbitrators. The additional information which will assist us in classifying arbitrators as securities or public arbitrators in accordance with the provisions of the new rules. (sic)

It is likely that a number of individuals now serving as public arbitrators will be reclassified as securities arbitrators or be removed from the national pool. In order to accurately make this determination, we ask that you fill cut the enclosed questionnaire and return it to the address below.

Arbitrators should make a reasonable effort to inform themselves of any interests or relationships described above. In addition, the obligation to disclose interests or relationships is a continuing duty, and the NASD Arbitration Department should be informed as changes occur.

Please complete the attached questionnaire and return it to the following address on or before ( ): (sic)

(REGIONAL OFFICE CONTACT AND ADDRESS)

If you have any questions, please feel free to contact (NAME OF CONTACT) at (REGIONAL OFFICE PHONE NUMBER). Thank you for your assistance in this effort.

DM:bb:js

Enclosure

STANLEY V. LEWIS
5307 LAKESHORE DR.
COLUMBIA, SC 29206
803-787-1820

CURRICULUM VITAE

Retired Deputy Securities Commissioner
State of South Carolina (1973-1989)
Chief Examiner, South Carolina Securities Commission (1970-1973)
Broker, G.H. Crawford Co., Columbia South Carolina (1965-1970)

Qualified as expert witness in South Carolina Courts

Testified in numerous cases in State and Federal Courts and arbitration proceedings in South Carolina, North Carolina and Georgia.

Have taught Securities Law and Limited Partnerships at CLE and Bar Association classes. Lecturer at the Universities of North and South Carolina Law Schools. Lecturer at the Universidad de Valle, and Javeriana University, in Cali, Columbia SA

Panelist in various SEC, NASD and North American Securities Administrators Association panels concerning Arbitration and Broker Dealer and Investment Advisor problems.

Enrolled as an arbitrator, on the arbitration panels of the NASD, American Arbitration Association, the New York Stock Exchange, the American Stock Exchange and the National Futures Association.

Assisted in design and implementation and enhancement of nation-wide computerized Central Registration Depository (CRD) securities agent and broker-dealer licensing system.

Former member of Board of Directors of The North American Securities Administrators Association.

Served as Parliamentarian for NASAA business meetings.

Served as Chairman of Non-Profit Issuer Committee.

Served as Chairman of Theatrical Issuer Committee.

Former member of Oil and Gas Committee.

Member of Central Registration Depository Committee.

Born: Portsmouth, Ohio August 2, 1919

Married, no children

Attended private elementary and high schools, Portsmouth, Ohio

Attended Guilford College, Greensboro, NC and University of South Carolina.

[handwritten:] Input 8/29/91

NASD

April 15, 1992
(Faxed)

DAVID CLARK

125 SOUTH ELM ST.

GREENSBUROUGH (sic), NC 27402

PUBLIC DISCLOSURE PROGRAM

RESPONSE TO REQUEST FOR INFORMATION

The Board of Governors of the National Association of Securities Dealers, Inc. (NASD) has adopted a public disclosure policy which permits certain types of disciplinary information on NASD member firms and associated persons to be available to the general public. Section 15A(i) of the Securities Exchange Act of 1934, as amended, requires registered securities

associations to respond to inquiries regarding disciplinary actions involving its members and their associated persons. The NASD believes that the general public should have access to information which will help them in their determination whether to conduct or continue to conduct business with an NASD member or any of the member's associated persons. In that regard, enclosed please find the information you have requested.

The NASD disclosure policy provides for the release of final disciplinary action(s), if any, taken by self-regulatory organizations or federal or state securities agencies that relate to securities or commodities transactions; and also includes criminal convictions, if any, reported to the NASD and required to be disclosed on uniform forms filed by NASD member firms or associated persons.

A list of the terms and conditions of the NASD Public Disclosure Program is printed on the reverse of this document.

MEMBER PERSON:JOHNSON (SR), MARSHALL HARDY

CRD NUMBER: 259892

PaineWebber

Full Account Title Louise D. Remmey

Branch GK

Account Number 00602

Broker 39

Arbitration 15. Any controversy between us arising out of or relating to this contract or the breach thereof, shall be settled by arbitration, in accordance with the rules, then obtaining, of either the Arbitration Committee of the New York Stock Exchange, American Stock Exchange, National Association of Securities Dealers or where appropriate, Chicago Board Option Exchange or Commodities Futures Trading Commission,

as I may elect. I authorize you if I do not make such election, by registered mail addressed to you at your main office within fifteen (15) days after receipt of notification from you requesting such an election, to make such election in my behalf. Any arbitration hereunder shall be before at least three arbitrators and the award of the arbitrators, or of a majority of them, shall be final, and judgment upon the award rendered may be entered in any court, state or federal, having jurisdiction.

(3)

Supreme Court, U.S.
FILED
DEC 21 1994
OFFICE OF THE CLERK

No. 94-916

In The

Supreme Court of the United States

October Term 1994

KATHRYN THOMPSON REMMEY and
ERNEST M. REMMEY, Executors
of the Estate of LOUISE REMMEY, Deceased,
Petitioners,

v.

PAINEWEBBER INCORPORATED
and ARNOLD MARKS,
Respondents.

Petition For Writ of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

BRIEF IN OPPOSITION

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BROOKS, PIERCE, McLENDON,
HUMPHREY & LEONARD, L.L.P.
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Attorney for Respondents
*Counsel of Record

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No. 94-916

In The

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KATHRYN THOMPSON REMMEY and
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Petitioners

v.

PAINEWEBBER INCORPORATED
and ARNOLD MARKS,
Respondents.

Petition For Writ of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

Respondents PaineWebber Incorporated and Arnold Marks respectfully submit that a Writ of Certiorari to review the opinion of the United States Court of Appeals for the Fourth Circuit in *Remmey v. PaineWebber Inc.*, 32 F.3d 143 (4th Cir. 1994), is unnecessary and should not issue for the reasons set forth below.

STATEMENT OF THE CASE AND FACTS

The issues raised by this Petition concern the integrity of the three member arbitration panel which heard and rejected Petitioners' claims. Petitioners assert that each panel member was biased or unqualified to serve as an arbitrator and the award should be vacated under the Federal Arbitration Act, 9 U.S.C.§1 *et seq.*

There are no novel questions here, no new rule of law and no change in existing law advocated by the Petitioners. They say only that the courts below did not properly apply settled law to the facts now before this High Court. Two courts have already reviewed the facts and considered the law, however, and the four judges of those two courts have been in unanimity that there is no basis for disturbing the decision of the arbitrators. The Petition for Certiorari should be denied.

The facts in this securities arbitration, which was conducted under the auspices of the National Association of Securities Dealers (the "NASD"), were hotly contested. They were presented in ten hearing sessions over a period of five days. Petitioners contended that their decedent (Louise Remmey) was incompetent at the time that she made investments with the Respondents in certain real estate limited partnerships. There was substantial countervailing evidence presented by the Respondents as to the competence of the decedent and her intentions in making these investments. Mrs. Remmey was described by her own family as "strong

willed" and "independent". (JA138).[1] Her friends described her as a "businesswoman" and "completely lucid". (JA160). Her personal physician testified that she was competent to conduct her financial affairs. (T27 [S7-8]). She followed her investments closely, and she personally came to the brokerage firm office once a week. (JA124). She maintained detailed ledgers of her investments. (JA127, 141). The limited partnerships in which she decided to invest met her investment objectives of current income and potential appreciation of the underlying property. (JA75-76, 171).

Mrs. Remmey signed a statement for each of her partnership purchases that she had received a prospectus and that she had knowledge of its contents. (JA92-93, 97). Investments of his type did not carry in the late 1980's the negative connotation that they do today. The real estate limited partnerships in which Mrs. Remmey invested had at that time a ten year track record of successful syndications. (JA84, 96). They had been offered by a "leader" in the business, according to Mrs. Remmey's own expert witness. (JA111).

There was conflicting evidence too of the extent of Mrs. Remmey's loss. Every one of these partnerships was continuing to make regular, quarterly payments to Mrs. Remmey at the time of the arbitration hearing. (JA171). There was evidence that her account had an overall profit of $90,000 during the time Mr. Marks served as her broker. Hindsight may have proven that better investments could have

---

[1]The references to "JA" are to the Joint Appendix filed with the Fourth Circuit. The references to "T" are to the Transcript of the arbitration proceeding.

been made, but if that were the test, every bad investment would be the basis for a claim of fraud.

The arbitrators credited the testimony presented by the Respondents and found for the broker and the brokerage firm. They awarded Petitioners nothing on their claims. Petitioners' unflagging effort since then to upset the determination of the arbitrators has been targeted at the qualifications and character of the arbitrators.

REASONS FOR DENYING CERTIORARI

I.

The Petition Is Premised On The Unfounded Argument That Arbitration Awards Are To Be Closely Scrutinized By The Federal Courts.

The standard of review of arbitration awards is an important concern here. Petitioners advocate that the federal courts are to engage in searching oversight of the arbitration process, relying on *Shearson/American Express v. McMahon*, 482 U.S. 220 (1987). That case does not say (as Petitioners say it does) that it is the job of the judiciary to supervise the decisions of arbitrators. What the Court said in that case was this:

> we have indicated that there is no reason to assume at the outset that arbitrators will not follow the law; although **judicial scrutiny of arbitration awards necessarily is limited**, such review is sufficient to ensure that arbitrators comply with the requirements of the statute.

Id. at 232 (emphasis added).

Review of arbitration awards is indeed limited, as the Fourth Circuit noted in *Richmond, Fredericksburg & Potomac R.R. Co. v. Transportation Communications Int'l Union*, 973 F.2d 276 (4th Cir. 1992):

> '[T]he effectiveness of any pro-arbitration policy is dependent, in the first instance, on a limited scope of judicial review of the arbitrator's determination.' *U.S. Bulk Carriers, Inc. v. Arguelles*, 400 U.S. 351, 360 (1971)(Harlan, J., concurring). Thus, judicial review of an arbitration award is '**among the narrowest known to the law.**' *Union Pac. R.R. Co. v. Sheehan*, 439 U.S. 89, 91 (1978). '**Every presumption is in favor of the validity of the award.**' *Burchell v. Marsh*, 58 U.S. 344, 351 (1855).

973 F.2d at 278 (emphasis added).

The scope of judicial review of the awards of arbitrators is created and bounded by the terms of 9 U.S.C. §10(a). The pertinent part of the statute reads as follows:

> In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon application of any party to the arbitration —

> (1) Where the award was procured by corruption, fraud, or undue means.
>
> (2) Where there was evident partiality or corruption in the arbitrators, or either of them.
>
> (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
>
> (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a).

Petitioners have not bothered to detail in their Petition the statutory ground for their challenge, but the attack on the integrity of Arbitrator Johnson is presumably one of "evident partiality or corruption" under §10(a)(2). The attack upon Arbitrators Lewis and Schwimmer is not one of partiality, but

only that they were not properly qualified to be arbitrators. That claim does not fit well into the statute, but it is perhaps a suggestion that "the award was procured by. . .undue means." *Id.* at §10(a)(1). Both claims are without merit.

II.

Petitioners Did Not Meet The High Standard, Which Prevails Uniformly Throughout The Circuits, Necessary To Establish "Evident Partiality" In The Award.

There is no split among the Circuits, as Petitioners contend, regarding the standard applicable to determining whether there has been "evident partiality." The required showing is that "a reasonable person would have to conclude that an arbitrator was partial" to the successful party at the arbitration. *Apperson v. Fleet Carrier Corp.*, 879 F.2d 1344, 1358 (6th Cir.), *cert. denied*, 493 U.S. 809 (1989); *Morelite Const. Corp. v. New York City District Council Carpenters Benefit Fund*, 748 F.2d 79 (2d Cir. 1984); *Accord Middlesex Mut. Ins. Co. v. Levine*, 675 F.2d 1197, 1201 (11th Cir. 1982)("reasonable impression of partiality"); *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 681-82 (7th Cir.), *cert. denied*, 464 U.S. 1009 (1983)(circumstances must be "powerfully suggestive of bias"); *Toyota of Berkeley v. Automobile Salesmen's Union*, 834 F.2d 751, 756 (9th Cir. 1987), *cert. denied*, 486 U.S. 1043 (1988)("a reasonable impression of partiality.").[2]

---

[2]The reliance of Petitioners on *Affiliated Ute Citizens v. United States*, 406 U.S. 128 (1972) to establish the materiality of the alleged "non-disclosure" of Arbitrator

The Fourth Circuit's ruling was consistent with this standard. It said in its opinion that "a mere appearance of bias is insufficient to demonstrate evident partiality.. . .[An appellant] must establish specific facts that indicate improper motives on the part of an arbitrator." 32 F.3d at 148 (quoting *Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co.*, 991 F.2d 141, 146 (4th Cir. 1993)). It is the "specific facts" indicating improper motive which were never presented by Petitioners, and which caused them to fall short of the "reasonable person" standard which prevails throughout the Circuits.

A.

"Evident Partiality" Is Established By An Arbitrator's Financial Interest In The Arbitration Or A Relationship With One Of The Parties.

Evident partiality typically arises when there is an arbitrator who has either a financial interest in the arbitration or a preexisting relationship with one of the parties, or both. That was the situation confronted by this court in *Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145 (1968), where the arbitrator and one of the parties had "close financial relations that had existed between them for a period of years." *Id.* at 148.

Johnson is more than curious. *Affiliated Ute* creates a presumption of reliance in securities fraud cases that an omitted fact was "material" for liability purposes. To Respondent's knowledge, the doctrine has never been applied in an arbitration case.

The factors which courts therefore traditionally examine in assessing a claim of evident partiality are the financial interest, the directness of the relationship, and the timing of the relationship. *Sanford Home for Adults v. International Federation of Health Professionals*, 665 F. Supp. 312, 320 (S.D.N.Y. 1987); *Apperson v. Fleet Carrier Corp.*, 879 F.2d 1344, 1360 n.21 (6th Cir.), *cert. denied*, 493 U.S. 809 (1989). These are the **only factors** which will establish bias. *See, e.g., Herrin v. Milton M. Stewart, Inc.*, 558 So.2d 863, 865 (Miss. 1990)("Personal bias of an arbitrator cannot be shown by means other than pecuniary interest or some other actual relationship between the parties.").

The problem that has plagued Mrs. Remmey throughout her tortuous course through the courts below is that her suggestion of partiality is without any foundation whatsoever. There is nothing here to cause a reasonable person to conclude that any arbitrator was partial to the Respondents.

B.

The Minor Disciplinary History Of Arbitrator Johnson Is Not "Evident Partiality."

There are no facts here that any of the arbitrators had an interest in the outcome of the arbitration. What the Petitioner contends is the "evident partiality" here is that Arbitrator Johnson had a record of discipline with the NASD, and that this was not disclosed to him. There were disciplines, but they were for very old and very minor infractions. They were of a bookkeeping nature. None involved a customer complaint like the one at issue in this arbitration.

The first violation was sixteen years old. It was resolved by settlement, apparently without any complaint being filed. Some transactions at Arbitrator Johnson's firm had not been booked for a period of four days in 1978. There were some inaccuracies in ledgers, and some transactions had not been liquidated in the proper period of time. The firm was also charged with failing to maintain adequate supervisory procedures, since four people designated to perform such functions were no longer with the firm. The firm replaced its bookkeeping personnel and updated its supervisory procedures to reflect its then current personnel. The firm was fined $500. (JA289-91).

The only Complaint ever filed personally against Arbitrator Johnson (as opposed to the firm for which he worked) which resulted in any penalty was Complaint No. W-361, which was filed with the NASD in November 1979. (JA282-85). This Complaint alleged that (I) Arbitrator Johnson's firm had failed to comply with the SEC's net capital rules, (ii) it had failed to report its net capital deficiency to the proper authority and (iii) it had put a sticker on "various prospectuses" which obscured the names of some of the other underwriters for the offering.

This Complaint was also settled. The NASD found the net capital "violations" to be extremely minor, and to have lasted all of a day. It found the stickering matter "more serious", but noted that the recipients of the prospectuses were primarily longstanding clients of the firm who were familiar with its business. Arbitrator Johnson and the firm

were fined the sum of $1,000, jointly and severally, for these violations. (JA285).[3]

Arbitrator Johnson's "record", such that it was, had been "clean" for over twelve years when the arbitration took place. If these violations established some sort of bias, that bias was certainly minimized by the remoteness of the violations. *See Ruffin Woody and Associates, Inc. v. Person County*, 92 N.C.App. 129, 141, 374 S.E.2d 165, 172 (1988)(refusing to set aside arbitration award where one arbitrator had performed services for a party in the 1960's; work was "remote enough in time to dissipate any partiality. . . ."), *rev. denied*, 324 N.C. 337, 378 S.E.2d 799 (1989).

But what Petitioners have never shown is how these minor disciplines from the NASD equate to bias on the part of Arbitrator Johnson. Petitioners point to no facts which establish that these minor sanctions impaired Arbitrator Johnson's ability to fairly hear and rule upon the evidence. In fact, precisely the opposite inference might be warranted here — that the sanctions made Arbitrator Johnson more circumspect in judging the conduct of other brokers and biased him **against** the Respondents. Either way, however, the suggestion of bias is only speculation. The law requires more than that. The party seeking to set aside an arbitration award must show that the bias is "**direct, definite and capable of demonstration**. . . ." *Peoples Security Life Ins. Co. v. Monumental Life Ins. Co.*, 991 F.2d 141, 146 (4th Cir. 1993)(emphasis added); *Atlantic Shores Resort Joint Venture v. Martin*, 731 F. Supp. 1279 (D.S.C. 1990).

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[3]Another NASD complaint against Arbitrator Johnson's firm dates back to 1971. It was dismissed. (JA302).

There is no argument to be made here that the NASD Rules required disclosure of these matters. The NASD's Code of Arbitration Procedure provides only that a party is entitled to "the arbitrators' names and employment histories for the **past ten (10) years**" and that further inquiry may be made. NASD Code §21 (emphasis added). These ancient matters were not required to be disclosed, but they were hardly a secret. Petitioners discovered them on their own, after the arbitration was over, through the NASD's "Public Disclosure Program". This information was readily available for the asking before the arbitration began, but Petitioners did not obtain it. It would hardly have involved the "time-consuming and expensive. . .background check on the arbitrators" which Petitioners suggest would have been necessary for them to have requested this information in advance of the arbitration.

To the extent the Petitioners complain that Arbitrator Johnson did not disclose these disciplines to the NASD when he applied to be an arbitrator, that contention is also not a basis for certiorari. The "concealment" is hardly clear from the disclosure form, but the NASD was the body which had meted out the discipline. It surely knew of these disciplines when it qualified Mr. Johnson as an arbitrator. There was no evidence presented in the court below that these minor and dated disciplines disqualified Arbitrator Johnson from being an arbitrator.

This Court should not grant certiorari to entertain this after the fact challenge to the award.

III.

The Complaint That Arbitrators Lewis and Schwimmer Were Not Properly Qualified Is Without Merit.

The challenges raised to Arbitrators Lewis and Schwimmer have equally little substance. Arbitrator Lewis, it is suggested, was not properly qualified as a public arbitrator.[4] The reason is that he "might" have spent more than 20% of his time since retiring as a Deputy Securities Commissioner for the State of South Carolina acting as an expert witness for securities firms. There is nothing to substantiate that claim. Petitioners brought forward no evidence to establish the extent of Arbitrator Lewis' activity in this arena. But if Arbitrator Lewis had such an affiliation, he was required to disclose it. Section 23 of the NASD Code says in pertinent part that:

> (a) Each arbitrator shall be required to disclose to the Director of Arbitration any circumstances which might preclude such arbitrator from rendering an objective and impartial determination. Each arbitrator shall disclose:

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[4]The NASD Rules provided that this panel was to be composed of one arbitrator affiliated with the securities industry, and two public arbitrators without such an affiliation. NASD Code §19(a). A person cannot be a public arbitrator if he "is an attorney, accountant, or other professional who has devoted twenty (20) percent or more of his or her professional work effort to securities industry clients within the last two years." *Id.* at §19(c)(5).

* * *

> (2) **Any existing** or past financial, **business, professional**, family, or social **relationships** that are likely to affect impartiality or might reasonably create an appearance of partiality or bias.

NASD Code §23(a)(2)(emphasis added). Arbitrator Lewis would have been required to disclose his expert witness activities if they had occurred. He did not, and the presumption must be that he was qualified to be a public arbitrator.

Arbitrator Schwimmer is a target of the Petitioners' unhappiness with the result they obtained because he may not have ever completed an arbitrator profile form. Testimony from the NASD, however, made it clear that Arbitrator Schwimmer had properly qualified as an arbitrator before such forms began being used. The NASD's Director of Arbitration made it unequivocally clear that the lack of a completed form did not disqualify Mr. Schwimmer from service in an Affidavit she signed. (JA366 at ¶¶3, 6).

Petitioners argue that Arbitrator Lewis and Arbitrator Schwimmer could not have been properly qualified as arbitrators because they did not return a questionnaire to update their arbitrator profiles. Petitioners contend that this violated regulations of the Securities and Exchange Commission, but they point to no such regulations and in fact there are none. The Director of Arbitration made it clear in the Affidavit she filed with the District Court that the lack of a completed questionnaire did not disqualify a person as a public arbitrator. (JA366 at ¶3). As the Fourth Circuit noted

in its opinion, "appellants' counsel conceded at oral argument that no NASD Rule required return of the questionnaire form." before an arbitrator could be properly qualified. 32 F.3d at 147. All the NASD Rules say on this subject is that the Director of Arbitration is charged with appointing panels of arbitrators "from the existing pool of arbitrators." NASD Code §4.

Petitioners have complained long and loudly that they should have received the NASD's internal records on the arbitrators, but there is no requirement in the NASD Rules that a party to an arbitration be given such unfettered access to the business history of an arbitrator. Such a requirement would indeed be contrary to direct precedent from this Court, which is that an arbitrator "cannot be expected to provide the parties with his complete and unexpurgated business biography." *Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145, 151 (1968)(White, J., concurring). The Petitioners refuse to accept that there are limits on the information they were entitled to obtain regarding the arbitrators. The NASD's Code of Arbitration Procedure provides only that a party is entitled to "the arbitrators' names and employment histories for the past ten (10) years" and that further inquiry may be made. NASD Code §21. Petitioners simply were not entitled to the information which they complain was due them.

CONCLUSION

Petitioners claim that the Fourth Circuit's opinion "guts the concept of arbitration, which is to provide a convenient and less expensive way to resolve disputes." Pet. at 24. It is Petitioners, however, who have done the gutting. Their extensive post-arbitration litigation in pursuit of their

effort to obtain what the Fourth Circuit referred to as "the ultimate attempt at a second bite" at the apple (32 F.3d at 147) has eviscerated any of the expediency and convenience of an arbitration proceeding. Petitioners had their day in Court (they actually had five of them) and they did not prevail. This case should end now, and Respondents respectfully request that the Petition for Certiorari be denied.

Respectfully submitted,

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NO. 94-916

In The
Supreme Court of The United States
October Term 1994

KATHRYN THOMPSON REMMEY and ERNEST M. REMMEY, Executors of the Estate of LOUISE REMMEY, Deceased,
Petitioners,

v.

PAINEWEBBER INCORPORATED and ARNOLD MARKS,
Respondents.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Fourth Circuit

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REPLY BRIEF

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INTRODUCTION

Respondents suggest a lack of specificity in the Petition for Certiorari as to the grounds set forth in 9 U.S.C. § 10(a) on which petitioners claim this arbitration should be vacated. If the Petition is in any way deficient in this regard we gladly supply various grounds.[1]

CLAIMS AS TO JOHNSON

As to Johnson, who falsified the application by which he became an arbitrator, the grounds are easy: "Corruption, fraud or undue means" pursuant to § 10(a)(1), "evident partiality or corruption" pursuant to § 10(b)(2), or, in particular, "misconduct" by which the "rights of any party have been prejudiced" pursuant to § 10(a)(3).

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[1] Respondents have cited to portions of the Joint Appendix in the Fourth Circuit using JA as an abbreviation. We will do likewise herein. Otherwise, any references will be to the Appendix in this Court, using the abbreviation A.

Respondents urge upon this Court a denial of certiorari, which, under the Fourth Circuit opinion, means that a deliberate false statement by an arbitrator (JA 274) which deprives a party of her right, clearly specified under the NASD rules, to challenge an arbitrator peremptorily, is not arbitrator misconduct under § 10(a)(3). Apparently, so far as the Fourth Circuit is concerned, in today's permissive society an untruth is no longer misconduct.

It cannot be argued that petitioner did not have, under NASD's Code of Arbitration Procedure, § 22 (A 69), the right to a peremptory challenge to any one of the arbitrators. Nor can it be argued that the information as to Johnson's ethical violations was not material to someone deciding whether to assert a challenge. Respondents' arguments that

Johnson's violations were not serious miss the mark. The Fourth Circuit has already held that Johnson's ethical violations were material. See Petition, p. 20.[2] But in holding that the violations did not prove bias, the Fourth Circuit also missed the point. Mrs. Remmey was deprived of material information relating to her right to challenge the arbitrator regardless of whether the information did or did not establish bias. She and her counsel had the right to decide for themselves whether they believed Johnson might be biased

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[2] Respondents are mistaken in arguing, Brief in Opposition, p. 10, that the 1978 ethical violations referred to in the Petition, p. 9 were against Johnson's firm only. This is incorrect. All the violations referred to in the Petition, and the fines of $1,000 and $500, were against both Johnson and his firm (McDaniel Lewis & Company), jointly and severally. Thus, there were six findings of ethical violations against Johnson at the time he swore there were none in his application to be appointed an NASD arbitrator. JA 279-92.

because of his violations and thereby to decide whether to challenge him or not. See Middlesex Mut. Ins. Co. v. Levine, 675 F.2d 1197 (11th Cir. 1982); Rogers, Att'y Gen. v. Schering Corp., 165 F.Supp. 295 (D.N.J. 1958), mot. den. 262 F.2d 180, (3d Cir. 1959), aff'd 271 F.2d 266 (3d Cir. 1959), cert. den. 359 U.S. 991 (1959).

Respondents purport not to understand the meaning of Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972), discussed in the Petition. While Affiliated Ute was a securities case, its holding that failure to disclose material information establishes a presumption of causation in fact is universal. The law does not require a party to prove a negative or hypothesize about what withheld material information would have proved. As Affiliated Ute states at pp. 153-54:

> [P]ositive proof of reliance is not a prerequisite to recovery. All that is necessary [for recovery] is that the facts withheld be material in the sense that a reasonable investor might have considered them important in the making of this decision. (Citations omitted). This obligation to disclose and this withholding of a material fact establish the requisite element of causation in fact.

Clearly, any party to an arbitration would have considered the information as to Johnson important on the decision whether to challenge him as an arbitrator.

But the Fourth Circuit not only ignored this withholding of material information from Mrs. Remmey. Its opinion goes much further and holds that in order to establish an impermissible award Mrs. Remmey had to show that Johnson's infractions actually "affected Johnson's impartiality ...." A 16. Contrary to respondents' arguments, the other federal circuits make no such requirement that an

effect on impartiality be proved. The other circuits hold that it is sufficient to show facts which constitute a "reasonable impression" of bias, a far different standard than one which requires actual proof of bias. See Petition, pp. 17-18. Since bias is subjective, the Fourth Circuit standard is impossible to meet.

Beyond that, respondents would tell this Court, and the Fourth Circuit seems to hold, that the only way even to show a "reasonable impression" of bias is by showing a financial or personal relationship by an arbitrator with a party. We know of no other federal circuits which have so held, and certainly, whatever its facts, that is not the meaning of Commonwealth Coatings Corp. v. Continental Cas. Co., 393 U.S. 145 (1968), which abhors even "an impression

of possible bias" and requires "strict morality and fairness ... on the part of the arbitrator," 393 U.S. at 148.

Respondents argue that the NASD had the information about Johnson's ethical violations. It is certainly true that another division of the NASD had the information. If NASD withheld the information deliberately, that worsens the injustice here. But if NASD was, itself, fooled by Johnson's false application, to put the burden on a party to find out information which NASD didn't bother to find in its files places an absurd burden on claimants in arbitration and destroys arbitration as an efficient process.

CLAIMS AS TO LEWIS AND SCHWIMMER

Respondents are correct that the use of these two individuals as arbitrators constitutes an arbitral award "procured by

... undue means. 9 U.S.C. § 10(a)(1). (Brief in Opposition, pp. 6-7). The rules of NASD are specific. Under NASD Code § 19(c)(5), A 67, the NASD is required to exclude from an arbitration panel any "professional who has devoted twenty (20) percent or more of his or her professional work effort to securities industry clients within the last two years." This rule was adopted because of concerns by this Court and SEC. A 83. Respondents do not argue that NASD ever determined that Lewis and Schwimmer did less than 20% of their work effort for industry clients. Their argument is that petitioner didn't prove that Lewis and Schwimmer were not qualified. But the burden of proof upon petitioners, if any, was no more than to show that these arbitrators had not been duly qualified in accordance with NASD's rules. That was clearly shown. The

purported contract signed by Mrs. Remmey contracted for arbitrators appointed in accordance with the rules of NASD. A 92. If NASD did not appoint arbitrators whom it had qualified according to its own rules, Mrs. Remmey was deprived of her contractual rights and any arbitral decision by such arbitrators was indeed obtained by "undue means" and in violation of Mrs. Remmey's rights of due process.

Defendants argue that the director of arbitration for NASD filed an affidavit with the district court which stated that the lack of a completed sworn questionnaire update did not disqualify a person as a public arbitrator.[3] JA 366.

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[3] This affidavit also made clear that the Arbitrator Profile Questionnaire update, which should have been immediately returned by Schwimmer and Lewis, was forwarded to them on March 26, 1990, and that even to the date of the director's affidavit, January 29, 1993, almost three years later, neither Schwimmer nor Lewis had ever returned it.

The director of arbitration cited no rule supporting this position in her self-serving affidavit, obviously signed at respondents' request for purposes of this case. It is hard to give credence to such a statement in the face of the same director's memorandum which stated that NASD's data base upon which it qualifies arbitrators "requires"

> additional information which will assist us in classifying arbitrators as securities or public arbitrators in accordance with the provisions of the new rules. (Emphasis supplied). A 86.

Respondents also seek to excuse the lack of anything in NASD's files which could establish Schwimmer's credentials at any time. Again, respondents argue the self-serving affidavit by NASD's director of arbitration to the effect that Schwimmer had been approved prior to NASD's utilization of either the

arbitrator questionnaire or the arbitrator profile update, and this made it appropriate for NASD to appoint Schwimmer as an arbitrator. How can this be, particularly since new rules for arbitrator appointment had been adopted by NASD because of SEC and the Supreme Court pressure? Apparently for NASD its own amended Code of Arbitration Procedure rules, such as § 19(c)(5), are followed only if NASD feels like it. What clearer evidence of sloppy failure to accord Mrs. Remmey due process of law need be cited.

RESPONDENTS' DISCUSSION ON THE MERITS

At pages 2-4 of the Brief in Opposition respondents make certain arguments which seek to convince, by implication, that respondents had justification for what was done to Mrs. Remmey's estate, and that petitioners' attack on the arbitrators here is only

sour grapes because the arbitrators ruled against petitioner. In truth, the decision by the arbitrators was outrageous, as the record below demonstrates, but because, as respondents argue, judicial review of the merits of an arbitration award is narrow, petitioners necessarily are concentrating in this Court on clear violations of Mrs. Remmey's procedural rights as to which there can be no argument on the facts. But since respondents have made the contentions they have on the merits, we comment briefly thereon.

A. Respondents' Arguments As to Mrs. Remmey's Competence

Essentially Mrs. Remmey was, if at all, only marginally competent throughout the time frame that her account was handled by defendants, and she was totally

incompetent at the end of that time. However, Mrs. Remmey's claim in no way depends upon whether she was competent or not. Even if she had been totally competent, investment of 65% of her assets in real estate limited partnerships was clearly unsuitable and in violation of ethical dealing specified by the NASD Rules of Fair Practice, A 72-75. Defendants' counsel in the arbitration proceeding admitted as much, but sought to justify these investments by the PW broker Marks on the ground that Mrs. Remmey believed real estate limited partnerships, which would not pay out for at least ten years, were a form of estate planning. JA 181-82. A belief that these high risk partnerships, with high front end expenses, and commissions of about seven times usual New York Stock Exchange commissions, were suitable and safe for

that purpose demonstrates, in itself, a lack of competence. JA 187-94.

B. Delivery of Prospectuses

Defendants argue that Mrs. Remmey received each applicable prospectus and had knowledge of its contents. There is no way that this 82 year old woman understood the contents of prospectuses, which included hundreds of pages, on the basis of a few minutes conversation with the broker. But more than that, the Fourth Circuit is flatly incorrect (A 28-29) in its holding that the evidence was conflicting as to whether Marks sold these partnerships without delivering current prospectuses, in violation of the criminal law, 15 U.S.C. § 77e. We defy anyone to find in this record any evidence that Marks delivered current prospectuses as to at least five of the ten partnerships sold to Mrs. Remmey. The

record below is clear that he did not. JA 237-46. He didn't even testify that he did. The sale of these partnerships in violation of criminal law is a clear violation of public policy and a well recognized ground for vacating an arbitration ruling. See, e.g., Gen. Warehouseman & Helpers Local, 767 v. Standard Brands, Inc., 579 F.2d 1282, 1292-93 (5th Cir. 1978), cert. den. 441 U.S. 957 (1979).

C. Damages to the Account

Defendants argue that each of the partnerships was making regular quarterly payments to Mrs. Remmey at the time of the arbitration hearing, citing the broker's self-serving testimony to that effect, and without referring to the fact that his testimony also indicated diminished payments on the part of those partnerships even at that time. JA 171. That the

partnerships were not totally bankrupt by the time of the arbitration hearing means very little, as does the illusory argument that the Remmey account had an overall profit of $90,000 during the three years and nine months it was mismanaged by the broker Marks. This argument can be made only by giving full credit to totally unsubstantiated hearsay valuations of the real estate limited partnerships testified to by a PW employee, rather than by considering the expert testimony offered by petitioner as to the true value of the partnerships. But even taking at face value defendants' figures, the only way their argument that the account generated an overall profit of $90,000 during the broker Marks' three years and nine months tenure is to count as <u>profit</u> taxable dividends and interest of $92,025.23 paid on the investments, other than the limited

partnerships, over the time the account was mismanaged by Marks. JA 29. Surely in an account of $519,253 Mrs. Remmey was entitled to some modest income over three years and nine months. Taxable income can in no sense be deemed a profit. In any event, the measure of damages is the difference between what this account produced and what a well managed account would have produced. See Miley v. Oppenheimer, 637 F.2d 318 (5th Cir. 1981). In this case that amount was a loss of $213,043 on the funds placed in the limited partnerships alone, even using PW's highly inflated contentions as to residual values of the limited partnerships. A 200.

The evils involved in the sale of these products by PaineWebber has belatedly been recognized by the SEC. SEC is now investigating PW for sales of these

limited partnerships and others between 1980 and 1992, and class actions seeking recovery will undoubtedly be instituted. Wall Street Journal, November 22, 1994. Unfortunately, because of the Fourth Circuit failure to oversee and reverse the gross violations of arbitration due process here involved, Mrs. Remmey's valid claims will be barred by res judicata in any forum, hardly a result likely to bolster public confidence in arbitration. Such confidence is currently at an all time low. See Can't Get No Satisfaction. Wall Street: Customers With Complaints Are Fed Up With the Arbitration System. So Are Their Brokers., Newsweek, August 29, 1994, p. 45.

It should also be noted that a class action, SEC v. Prudential Securities, Inc., 1993 CCH Fed. Sec. L. Rep. Transfer Binder, ¶ 97,780, was recently concluded upon an open-ended settlement of

$330,000,000 (recently increased by $330,000,000) to be paid by Prudential for claims arising out of the sale of products similar to those sold by PaineWebber to Mrs. Remmey in this case.

CONCLUSION

While review of the merits of arbitration decisions may be limited, there is no doubt that this Court requires of the lower federal courts supervision of the arbitration process system "sufficient to insure that arbitrators comply with the requirements of the [securities] statute." Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 232 (1987). This petition for certiorari involves clear systemic defects in arbitral due process in a securities matter. The case cries out for rulings by this Court which will clarify the duties of the lower federal

courts in this area of the law where public confidence has been so eroded.

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